2011

# Susie Strohm and Dorsey and Whitney, LLP v. ClearOne Communications, Inc. : Brief of Appellee

Utah Court of Appeals


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**IN THE UTAH SUPREME COURT**

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| SUSIE STROHM AND DORSEY & WHITNEY, LLP,<br><br>Plaintiffs and Appellees,<br><br>v.<br><br>CLEARONE COMMUNICATIONS, INC.,<br><br>Defendant and Appellant. | Appellate Case No. 20110569 SC |

# BRIEF OF APPELLEE AND CROSS-APPELLANT

APPEAL FROM THE ORDERS AND JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, HONORABLE ROBERT K. HILDER, CASE NO. 080917500


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## STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the Third Judicial District Court in and for Salt Lake County, State of Utah, by the Honorable Robert K. Hilder, which was entered on June 8, 2011 and certified as final pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, and from the ancillary and related rulings and orders on which the Judgment depends. The Utah Supreme Court has jurisdiction under Utah Code Ann. § 78A-3-102(3)(j) and Rule 3(a) of the Utah Rules of Appellate Procedure.

## STATEMENT OF THE ISSUES

### Issues Raised in ClearOne's Appeal

1. Whether the district court erred in granting Strohm and Dorsey's motion for partial summary judgment and ordering that Susie Strohm is entitled to indemnification from ClearOne under Utah Code Ann. §§ 16-10a-903, 905, and 907. This Court reviews the district court's grant of summary judgment for correctness. *Glenn v. Reese*, 2009 UT 80, ¶ 6, 225 P.3d 185 (Utah 2009). This issue corresponds to issue (b) in ClearOne's Statement of the Issues.

2. Whether the district court erred in granting Strohm and Dorsey's motion for summary judgment on their claim for breach of ClearOne's contractual obligations to pay Dorsey's fees. This issue comprises two sub-issues:

   a. Whether the district court erred in finding there was no genuine issue of material fact with respect to the intended terms of the parties' agreements, and that those agreements obligated ClearOne to pay Dorsey's fees incurred in defending Strohm in the Criminal Case, fees incurred in seeking enforcement of this contractual obligation, and interest thereon. This issue subsumes issues (c), (d), and (f) in ClearOne's Statement of the Issues.

   b. Whether the district court erred in concluding the intended terms of the parties' agreements were enforceable. This issue subsumes issues (a) and (e) in ClearOne's Statement of the Issues.

   This Court reviews the district court's grant of summary judgment for correctness, determining "only whether the district court erred in applying the governing law and whether the district court correctly held that there were no disputed issues of

material fact." *Salt Lake County v. Holliday Water Co.*, 2010 UT 45, ¶ 14, 234 P.3d 1105 (Utah 2010) (alterations omitted).

3. Whether the district court abused its discretion in making an award of fees and expenses in accordance with its earlier grants of summary judgment. This Court reviews the district court's fee award for abuse of discretion. *Valcarce v. Fitzgerald*, 961 P.2d 305, 315 (Utah 1998). This issue subsumes issues (g), (h), (i), and (j) in ClearOne's Statement of the Issues.

**Issues Raised in Dorsey and Strohm's Cross-Appeal**

1. Whether the district court erred in declining to award Dorsey's attorneys' fees and expenses incurred in representing Strohm after February 27, 2009, the date of the jury verdict. This issue was preserved at R.2982, and presents a question of law that this Court reviews for correctness. *Meadowbrook, LLC v. Flower*, 959 P.2d 115, 116 (Utah 1998).

2. Whether the district court erred in unilaterally establishing August 10, 2010, as the date on which Dorsey's attorneys' fees and expenses would cease to be reimbursed in the Collection Case. This issue was preserved at R.2983, and presents a question of law that this Court reviews for correctness. *Meadowbrook, LLC v. Flower*, 959 P.2d 115, 116 (Utah 1998).

3. Whether the district court erred in declining to award Dorsey the contractually agreed-upon 18 percent interest on fees incurred in the Collection Case. This issue was preserved at R.2983, and presents a question of law that this Court reviews for correctness. *Meadowbrook, LLC v. Flower*, 959 P.2d 115, 116 (Utah 1998); *see also Cornia v. Wilcox*, 898 P.2d 1379, 1387 (Utah 1995).

## DETERMINATIVE STATUTES AND RULES

The statutes and rules whose interpretation is determinative of the appeal or are of central importance to the appeal are as follows:

Utah Code Ann. § 16-10a-902

Utah Code Ann. § 16-10a-903

Utah Code Ann. § 16-10a-905

Utah Code Ann. § 16-10-907

These statutes and rules are set out verbatim in Addendum A to this brief.

## STATEMENT OF THE CASE

This is an appeal and cross-appeal from a Judgment entered by the Honorable Robert K. Hilder on June 8, 2011, awarding damages to Appellees and Cross-Appellants Susie Strohm ("Strohm") and Dorsey & Whitney LLP ("Dorsey"), against Appellant and Cross-Appellee ClearOne Communications, Inc. ("ClearOne"). Judge Hilder entered this Judgment based on two previous orders granting summary judgment for Strohm and Dorsey, which established overlapping legal bases for the recovery of fees and costs incurred in Dorsey's successful defense of Strohm, ClearOne's former Chief Financial Officer, against federal criminal securities fraud charges.

### Summary Judgment: Mandatory Indemnification

On August 12, 2009, Dorsey and Strohm sought partial summary judgment on the theory that Strohm was entitled to mandatory indemnification under Utah Code Ann. §§ 16-10a-903, 905, and 907. Strohm, a former officer of the company, had been acquitted of seven of eight counts in the federal criminal case. (R.1812, 1850). ClearOne opposed the motion and filed its own cross-motion for summary judgment. (R.2027-2050).

On November 19, 2009, the district court entered an order granting Dorsey and Strohm's motion and denying ClearOne's cross-motion. (R.2771). The district court ruled that the plain language of Utah Code Ann. §§ 16-10a-903 and 907 compelled ClearOne to indemnify Strohm for the defense of those claims with respect to which she was successful. (R.2772). The court also found that Utah Code Ann. § 16-10a-905(1)

compelled ClearOne to pay Strohm's "reasonable expenses incurred in order to obtain court-ordered indemnification." (R.2772).

**Summary Judgment: Engagement Agreements**

Early in the case, Dorsey and Strohm sought partial summary judgment on their claim that defense of the federal criminal case was covered under the plain language of the engagement agreement between ClearOne, Strohm, and her attorneys, which had been contained in two separate letter agreements. (R.501). On December 19, 2008, the district court held a hearing, and soon after entered an order essentially denying ClearOne's motion to dismiss and Dorsey and Strohm's motion for summary judgment, stating the scope of the engagement agreements was ambiguous and discovery was required to determine the "intention of the parties." (See R.0758, 5348, 5402).

After discovery by both parties, including ClearOne's own testimony (*see* R.2698), Dorsey and Strohm renewed their motion for partial summary judgment based on the engagement agreements on November 5, 2009. (2645, 2650). ClearOne brought a cross-motion for summary judgment. (R.2794, 2886).

On March 2, 2010, Judge Hilder entered his Ruling and Order on the summary judgment motions regarding the engagement agreements. (R.2956). The district court granted Dorsey and Strohm's motion and denied ClearOne's motion, holding that the engagement agreements provided an alternative obligation for ClearOne to pay Strohm's reasonable legal fees, as all the relevant extrinsic evidence supported that "ClearOne intended to provide Ms. Strohm a full defense, civil and criminal, and they intended to retain [Dorsey] for that purpose." (R.2962). The court further held that "Plaintiffs are

also entitled to judgment for interest and fees incurred in seeking to recover under the [engagement] agreements." (R.2968).

**Order on Reasonable Fees and Expenses and Appeal**

During these proceedings, the trial court deferred consideration of the amount and reasonableness of any expenses, including attorney's fees. Accordingly, on July 30, 2010, Dorsey and Strohm filed a petition for an award of attorneys' fees and costs. (R.2975-3150). After extensive briefing and hearings on the reasonableness of the fees, on January 24, 2011, the district court issued its Ruling and Order concerning the reasonableness of the rates charged by Dorsey and the overall reasonableness of the fees to be awarded for Strohm's criminal defense and for collecting her fees. (R.5149-5184). On June 8, 2011, the District court entered its Judgment concerning that award. (R.5310-5312).

## STATEMENT OF FACTS

ClearOne, a public company located in Salt Lake City, Utah, is a manufacturer of video-conferencing equipment. (See R.0055). On January 15, 2003, the Securities and Exchange Commission initiated a civil securities fraud investigation into certain accounting practices at ClearOne ("the SEC Action"). (R.1574). The SEC Action also focused on Fran Flood, ClearOne's Chief Executive Officer, and Susie Strohm, its Chief Financial Officer. (See R.1573-75, R.1967). Strohm was employed by ClearOne from February 1996 until December 2003, holding the CFO position at the time relevant to the SEC allegations.

In early 2003, while the SEC Action was pending, the U.S. Attorneys' Office for the District of Utah ("Utah USAO") impaneled a grand jury to begin a criminal investigation to parallel the SEC Action. (R.1834). On January 28, 2003, the Utah USAO informed ClearOne that it "had begun an investigation stemming from the complaint in the SEC action described above." (R.2692).

### A. The 2003 Engagement Agreement

On January 29, 2003—the day after the Utah USAO formally notified ClearOne of its parallel criminal investigation—ClearOne and Strohm executed an engagement agreement with Milo Steven Marsden, who was then employed as a partner at the law firm of Bendinger, Crockett, Peterson & Casey, PC (the "2003 Engagement Agreement"). (R.0042-44). Michael Keough, who was the interim CEO of ClearOne at that time, executed the 2003 Engagement Agreement for ClearOne. (*Id.*; R.2704). Within two months, Keough was named CEO of ClearOne. (*Id.*)

In the 2003 Engagement Agreement, ClearOne engaged Marsden and his firm "to represent Susie Strohm's interests in connection with the SEC civil complaint, referenced above, *and in connection with further related investigations and litigation.*" (R.0042) (emphasis added). In the 2003 Engagement Agreement, ClearOne further agreed:

> 3. Billing . . . ClearOne will pay the full amount of [the] bill within thirty days after receipt . . . Any amount billed and unpaid after such thirty day period shall bear and accrue interest at the rate of 18% per annum from the date billed until paid.
>
> 7. Attorney Fees . . . [Marsden and his firm] shall be entitled to recover all reasonable costs expended in connection with collecting amounts due under this Agreement, including reasonable attorneys' fees.

**B. The 2003 Joint Defense Agreement**

Faced with the SEC Action, a criminal investigation, and the possibility of future criminal indictments, on February 7, 2003, ClearOne, Strohm, and Flood entered into a "Joint Defense and Confidentiality Agreement" (the "Joint Defense Agreement"). (Addendum C at C-136-142).

**C. Employment Termination Agreement ("ETA")**

In December 2003, ClearOne and Strohm entered an "Employment Termination Agreement" (the "ETA") to resolve "disputes regarding Strohm's demand for indemnification." (R.0035-0040). The ETA acknowledges that Strohm was employed as ClearOne's CFO during the time period covered by the SEC's allegations; it recites that "the SEC action has spawned, and may continue to spawn, multiple related proceedings,

including . . . a grand jury investigation being conducted by the United States Department of Justice . . . ." (R.0035).

Pursuant to the ETA, Strohm made several significant concessions, including to: (i) resign "her employment with ClearOne, effective December 5, 2003"; (ii) cancel her unexercised options on approximately 268,464 shares of ClearOne stock (then worth over $1.2 million) and transfer to the company 15,500 shares she then owned; and (iii) "cooperate with the Company and its counsel in the defense and/or prosecution of the SEC Action and the Related Proceedings." (R.0004, R.0036-39). In exchange for those concessions, ClearOne agreed to, among other things, (i) "indemnify Strohm for any liability and for all reasonable attorneys' fees and costs incurred by her in connection with the SEC Action or any Related Proceedings, whether incurred before or after the effective date of this Agreement." (R.0037-38).[1]

**D. The 2004 Engagement Agreement**

In early 2004, Marsden left the Bendinger Crockett law firm to join Dorsey. On March 31, 2004, Marsden wrote to ClearOne and Strohm to inform them of this fact (the "2004 Engagement Agreement"). (R.0047-50). The letter states that "[o]ur engagement agreement needs to be updated to reflect this move." (R.0047). Keough, as CEO of ClearOne, executed the 2004 Engagement Agreement for ClearOne.

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1 Strohm has additionally brought claims in the district court against ClearOne for breach of the Employment Termination Agreement by failing to indemnify her in the criminal proceedings. (See R. 1573-74). The district court did not reach the terms of the Employment Termination Agreement in its decisions. Thus, this additional theory of recovery for Strohm's defense costs is not currently before this Court.

In the 2004 Engagement Agreement, ClearOne confirmed that it had engaged Marsden and Dorsey "to represent Susie Strohm in connection with the SEC civil complaint . . . and in connection with *further related investigations and litigation. . . .*" (R.0047). As the "update" to the terms of the 2003 Engagement Agreement, ClearOne further agreed in the 2004 Engagement Agreement, to (1) pay Dorsey's "usual and customary hourly rates"; and (2) to pay Dorsey's bill "on receipt." (R.0047-48).

**E. The Criminal Case**

In May of 2007, the Utah USAO contacted Marsden and informed him that Strohm was a grand jury "target." Marsden promptly informed ClearOne's counsel. (R.2696). On July 25, 2007, the grand jury returned an Indictment against Strohm and Flood, with essentially the same allegations as the SEC Action. (R.0262). The indictment charged Strohm with one count of conspiracy, two counts of making materially false and misleading statements to auditors, and two substantive counts of securities fraud. (*Id.*) Thereafter, the federal grand jury returned two superseding indictments, adding a charge of making material misrepresentations to auditors and two perjury counts against Strohm, as well as more counts against Flood. (R.0272, 0283).

Dorsey began work on the Criminal Case in May of 2007.[2] ClearOne paid bills submitted for services rendered for the first nine months. By March 2008, however, ClearOne refused to pay any further invoices for Strohm's defense in the Criminal Case.

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2 In public financial filings issued at that time, ClearOne expressly admitted it was obligated to indemnify Strohm in the Criminal Case. (R.0052-53; R.0092 R.0217).

(R.1836). Despite this unexpected development, Dorsey continued to represent its client, Strohm, at substantial financial risk, as evidenced by the amount of work that resulted.[3]

The Criminal Case went to trial on February 2, 2009. (R.1835). On February 27, 2009, the jury returned its verdict acquitting Strohm on seven of the eight claims that were brought against her. (*Id.*, R.1606). Strohm was ultimately convicted of only one perjury count, related to testimony at a preliminary injunction hearing in the SEC Action. By contrast, Strohm's co-defendant was convicted of all charges. On June 2, 2010, the district court sentenced Strohm to 24 months probation and 150 hours of community service. (R.3167). On November 8, 2011, the Tenth Circuit Court of Appeals affirmed her perjury conviction. *United States v. Strohm*, No. 10-4104 (11th Cir. Nov. 8, 2011).

**F. The Collection Case**

On August 21, 2008, months before the Criminal Case went to trial, Dorsey and Strohm commenced the instant proceeding—the Collection Case—by filing a complaint in Utah's Third Judicial District Court, seeking to enforce the indemnification obligation of ClearOne during Dorsey's preparation of the criminal case. (R.0001, 1572). After Strohm was acquitted, Dorsey and Strohm filed an Amended Complaint on July 29, 2009, dropping their request for injunctive relief as moot and—in light of Strohm's successful defense—adding a claim for mandatory indemnification under Utah Code Ann. § 16-10a-903. (R.1572).

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3 The Criminal Case involved more than 500,000 pages of documents, two dozen pre-trial witness interviews, the retention of a securities expert for accounting issues, the preparation of 49 witness kits for trial, a trial database of 1180 trial exhibits, and a four-week trial. (R.1639-45).

1. Plaintiffs' Motions for Summary Judgment: Mandatory Indemnification

On August 12, 2009, Strohm and Dorsey filed their Motion for Partial Summary Judgment seeking a judgment and order that Strohm was entitled to mandatory indemnification from ClearOne under Utah Code Ann. §§ 16-10a-903, 905, and 907, based on her being acquitted on seven of the eight counts against her in the Criminal Case. (R.1812).

On November 19, 2009 the court entered its Order-Indemnification, granting Plaintiffs' summary judgment motion. (R.2771). The Order ruled in pertinent part:

> a. Mandatory Indemnification: Under Utah Code Ann. §§ 16-10a-903 and 907, ClearOne shall indemnify Ms. Strohm for the "reasonable expenses incurred by her in connection with the proceeding or claim[s] with respect to which she has been successful." Specifically, Ms. Strohm successfully defended herself against seven of the eight Counts ("claims") alleged against her by the United States in the federal criminal proceeding . . .
>
> b. Expenses to Obtain Indemnification: Pursuant to Utah Code Ann. § 16-10a-905(1), ClearOne shall pay Ms. Strohm's "reasonable expenses incurred in order to obtain court-ordered indemnification," pursuant to Utah Code Ann. §§ 16-10a-903 and 907(1). (R.2772) (alterations omitted).

2. Plaintiffs' Motions for Summary Judgment: Engagement Agreements

Strohm and Dorsey filed their motion for partial summary judgment related to the Engagement Agreements shortly after filing their original Complaint. (R.501). In their motion, Dorsey and Strohm argued that the plain language of the Agreements required ClearOne to pay for Strohm's defense in the Criminal Case, and that ClearOne had breached the Engagement Agreements by refusing to pay any of Strohm's bills in connection with her defense since March of 2008. (R.0501, 0543).

The district court held a hearing on Dorsey and Strohm's motion (and other matters) on December 19, 2008. The Court found that it could not determine "the scope of the agreement" based solely on the plain language of the Engagement Agreements, and ruled that discovery would be required on "the intentions of the parties" with respect to their contractual obligations. (R.2957).

On March 17, 2009, Dorsey and Strohm noticed the deposition of ClearOne. (R.2748). Pursuant to Rule 30(b)(6) of the Utah Rules of Civil Procedure, the Deposition Notice demanded that ClearOne produce "one or more of its officers, directors, managing agents, or other persons who are knowledgeable and consent to testify on ClearOne's behalf. ClearOne notified Dorsey and Strohm that it had designated Mike Keough as its representative for these topics, and he was deposed on October 7, 2009. (R.2698, 2755). In addition to being ClearOne's designated corporate representative on these topics, Keough had been ClearOne's CEO at the time the Engagement Agreements were signed, and was the signator of the agreements. (R.0042-44, 47-50).

At the deposition, Keough testified that he understood, prior to executing the 2003 Engagement Agreement, that the Department of Justice was investigating Strohm and that criminal charges could be brought as a result of that investigation:

> Q. And you also understood in 2002, early 2003 as the CEO of ClearOne, that a DOJ investigation was being undertaken and that could result in a criminal litigation and claims being brought against Strohm and Flood.
>
> . . .
>
> A. Yes.

> Q. And those criminal claims that could be brought against Strohm and Flood would relate to or arise out of the SEC action, correct?
>
> . . .
>
> A. Yes.

(R.2706). Keough further testified that he understood the scope of Marsden's representation of Strohm under the 2003 Engagement Agreement included representation of her in any criminal case that might be brought, and that there was no discussion regarding a limitation on the scope of his representation:

> Q. And as I understand it, what you were telling me is that when [Marsden] was retained you understood, as the CEO of ClearOne, the scope of Mr. Marsden's representation was going to be representing Ms. Strohm in the SEC action, right?
>
> A. Yes.
>
> Q. He would represent her in the DOJ investigation?
>
> A. Yes.
>
> ***Q. And as you have told me, any and all other claims that might be brought against her, including any criminal indictments or criminal actions brought against her?***
>
> ***A. Yes.***

(R.2709-2710). Indeed, Keough testified that not only did ClearOne not intend the engagement agreements to be limited solely to the SEC Action, it expected Marsden would represent Strohm in any criminal action. (R.2727-2728; see also R.2727 (with Keough stating that he understood the phrase "further related investigations and litigation" in the 2003 Engagement Agreement, to include any criminal indictments and criminal actions against Strohm)). Further, Keough stated that he understood the 2004

Engagement Letter to state that Dorsey had been engaged to represent Strohm in potential criminal actions, but otherwise the terms of the 2003 Engagement Agreement remained in force. (R.2729-30).

With respect to interest on unpaid invoices, Keough testified that he and ClearOne understood, under the Engagement Agreements, that there would be 18 percent interest per annum on any invoice not paid within 30 days of receipt, (R.2726, 2731), and that he and ClearOne understood ClearOne would be obligated to pay for collection costs (including attorney's fees) in the event that the law firm was required to bring an action to collect its fees under the Engagement Agreements. (R.2727).

With the benefit of this undisputed extrinsic evidence of the parties' intentions in entering into the Engagement Agreements, Strohm and Dorsey filed a renewed motion for summary judgment on the Agreements on November 5, 2009. (2645, 2650). ClearOne filed a cross-motion. (R.2794, 2886). On March 2, 2010, the district court entered its Ruling and Order on the Plaintiffs' Renewed Motion for Partial Summary Judgment on their Third Claim for Relief (Engagement Agreements), and ClearOne's Cross Motion for Summary Judgment. (R.2956). The court granted Dorsey and Strohm's motion and denied ClearOne's cross-motion. (R.2967). The court stated the Engagement Agreements provided an "alternative basis" to require ClearOne to pay Strohm's reasonable legal fees incurred in (1) defense of the Criminal Case and (2) the Plaintiffs' collection action. (R.2967). Further, Dorsey and Strohm were held to also be entitled "to judgment for interest and fees incurred in seeking to recover under the letter agreements." (R.2968).

Judge Hilder expressly relied on several pieces of evidence in making his determination. He found that the undisputed facts, including the testimony of Keough, ClearOne's designated witness, and the recitals in the ETA and the Joint Defense Agreement, established that the scope of the Engagement Agreements included possible criminal proceedings, including the Criminal Case. (R.2960-61). He then closely examined the language in the 2004 Engagement Agreement to determine that it "implicitly incorporated" the terms of the 2003 Agreement, including the contractual claim for attorneys' fees incurred in enforcing the Agreements and the 18 percent interest terms that were first included in the 2003 agreement (all of which was consistent with Keough's testimony). (R.2963-64). Finally, the district court rejected ClearOne's argument that this Court's decision in *Jones, Waldo, Holbrook & McDonough v. Dawson*, 923 P.2d 1366 (Utah 1996) precluded recovery, stating that:

> ClearOne is not a client, but simply a third-party payor. The rights of Ms. Strohm under the applicable agreement cannot be vindicated unless she has competent counsel to assert those rights. This circumstance bears no resemblance to the case where a law firm represents a client, charges a fee apparently well in excess of the agreed cap, and more than the benefit received by the client, after which the firm uses its power to and expertise to enforce collection.

(R.2966-67). The court reserved decision on the amount, reasonableness, and allocation of fees and expenses.

3. Determination of Reasonableness of Attorneys' Fees and Expenses.

On July 30, 2010, Dorsey and Strohm filed their "Petition for an Award of Reasonable Attorneys' Fees and Costs." (R.2975-3150). The Petition was supported by

the Declaration of William Michael Jr. (R.3151-3383); Supplemental Declaration of Loren E. Weis (R.3384-3406); Declaration of David A. Greenwood (3407-3416); and Declaration of Milo Steven Marsden (R.3417-3629). On August 17, 2010, ClearOne filed its opposition and its supporting affidavits, and yet another cross-motion. (R.3678-3787; 4276-4876).

On September 23, 2010, the Court held a hearing on Dorsey and Strohm's Petition and ClearOne's cross-motion. (R.5359). On January 24, 2011 the Court issued its Ruling and Order and made a determination concerning the reasonableness of the rates charged by Dorsey and the overall reasonableness of the fees to be awarded in the Criminal Case and the Collection Case. (R.5149-5184). On June 8, 2011, the District court entered its Judgment concerning the award of reasonable attorneys' fees in the Criminal Case and the Collection Proceeding . (R.5310-5312).

The Judgment granted fees and costs to Dorsey and Strohm with the following included: (i) Judgment was entered in Dorsey's favor for breach of the Engagement Agreements; (ii) Judgment was entered in Strohm's favor on mandatory indemnification; (iii) Plaintiffs were awarded all hours and expenses billed and paid by ClearOne through the invoice that closed on March 31, 2008, with no adjustment or reimbursement; (iv) Plaintiffs were awarded reasonable fees and expenses incurred in the Criminal Case from April 1, 2008 through February 27, 2009; (v) Plaintiffs were awarded prejudgment interest on the Criminal Case fees and expenses at a rate of 18 percent; (vi) Plaintiffs were awarded reasonable attorneys' fees and expenses in the Collection Case through August 10, 2010. (R.5311-5312).

## SUMMARY OF THE ARGUMENT

The district court granted summary judgment in favor of Dorsey and Strohm on two counts of their First Amended Complaint that establish overlapping legal bases for ClearOne's obligation to pay Dorsey's fees, expenses, and interest incurred both in defending Strohm in the Criminal Case and in pursuing the present Collection Case. First, the district court concluded that Strohm is entitled to mandatory indemnification from ClearOne under Utah Code Ann. §§ 16-10a-903 and -907 because she successfully defended herself against seven of eight criminal counts in the Criminal Case. Second, after considering uncontradicted extrinsic evidence of the parties' intent in the Engagement Agreements, the district court held as a matter of law that ClearOne was contractually obligated to pay Dorsey's fees, expenses, and interest in both the criminal and collection proceedings. The district court then carefully examined the relevant considerations to calculate a reasonable fee award.

From this straightforward case ClearOne seeks to construct an appeal of intimidating complexity. The Court should not be misled. Despite the number of arguments ClearOne raises, the case remains a simple one. In the end, ClearOne's appeal raises only four major questions; Dorsey and Strohm's cross-appeal raises one.

First, ClearOne argues that the district court erred in concluding that Strohm is entitled to mandatory indemnification under the Utah Revised Business Corporation Act because ClearOne has a bylaw that prohibits indemnification of *directors* who did not meet a certain standard of conduct. (ClearOne's issue (b) and section III of its argument).

This argument baldly ignores the plain language of both the indemnification statute and ClearOne's bylaws. The statute only allows a corporation to limit mandatory indemnification in its *articles of incorporation*—not bylaws—and in any case the bylaw ClearOne points to explicitly applies to directors, not officers like Strohm. The district court correctly concluded Strohm is entitled to mandatory indemnification.

Second, ClearOne raises a host of issues with the district court's interpretation of the Engagement Agreements, seeking by any means possible to retroactively change the terms to which it knowingly and voluntarily agreed. (ClearOne's issues (c), (d), and (f), and sections IV-VI and IX of its argument). All of these arguments fail for one simple reason: The district court held the Agreements were ambiguous, and their interpretation is thus a question of fact. The *only* significant evidence of the parties' intent in entering into the Agreements came from ClearOne's own designated 30(b)(6) witness—its former CEO Michael Keough, who actually signed the Agreements on behalf of ClearOne—evidence ClearOne fails to address in its brief. Keough's testimony stands unrebutted and unequivocally establishes that ClearOne knowingly and intentionally agreed to pay Strohm's defense fees and costs, fees incurred in enforcing that obligation, and interest. ClearOne does not point to a single piece of evidence in the record to contradict these facts, and its semantic quibbling and grasping at canons of interpretation are consequently irrelevant. Moreover, even if the Court were to entertain ClearOne's interpretive arguments, each of them fails on its own terms. The district court correctly found the contractual terms by which the parties intended to be bound.

Third, unable to controvert the parties intent concerning the scope of the Agreements, ClearOne attacks their enforceability. It argues that this Court's prior decision in *Jones Waldo* prohibits Dorsey from recovering its fees as a pro se litigant, that Utah public policy prohibits indemnification of Strohm because of her single count of conviction, and that the provision for interest on unpaid fees is unenforceable as a matter of public policy. (ClearOne's issues (a) and (e), and sections I, II, and VIII of its argument). Each of these arguments fails. The indemnification statutes establish no policy that would prohibit indemnification of Strohm because they explicitly *allow* for indemnification under some circumstances where a corporate officer or director has not met the statutory standard of conduct. *Jones Waldo* does not apply to this case—as the district court properly recognized—most centrally because Dorsey represents a client, Susie Strohm (not ClearOne), and is not proceeding solely pro se. Finally, ClearOne points to no applicable statute or public policy preventing enforcement of the contractual interest provision in a fee agreement, which was entered into knowingly by the parties. The district court correctly concluded that the Engagement Agreements were fully enforceable as the parties intended.

Fourth, having raised every conceivable issue with the legal grounds for the district court's fee award, ClearOne attacks every imaginable aspect of the award itself, contending that the district court abused its discretion by awarding rates higher than typical Utah rates, that it improperly allocated fees among claims in the Collection Case, and that Dorsey charged excessive hours and expenses. (ClearOne's issues (g), (h), (i),

and (j), and sections X and XI of its argument). Again, ClearOne's arguments fails for several reasons: When a party challenges a district court's findings of fact on appeal, it must "first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below." *Chen v. Stewart*, 2004 UT 82, ¶ 76, 100 P.3d 1177 (Utah 2004) (citation omitted). ClearOne has utterly ignored that duty, and the Court should not entertain its arguments. Even if the Court were to do so, however, there is more than ample evidence in the record to support the factual aspects of the district court's fee award.

In their cross-appeal, Dorsey and Strohm raise three points, which essentially present a single issue: The district court erred by imposing arbitrary limits on the fee award that were not contemplated by the parties' Engagement Agreements. The Agreements contained no limitation on the time period for which ClearOne agreed to pay Strohm's defense fees, yet the district court declined to award any fees incurred in the Criminal Case after February 27, 2009, the date the jury returned its verdict. Similarly, the Agreements contained no time limit for recovery of fees incurred in the Collection Case, yet the district court arbitrarily cut off all fees incurred in this action after August 10, 2010. Finally, the district court erroneously declined to award the contractual 18 percent interest on fees awarded in the Collection Action, as agreed upon by the parties. While the district court must evaluate the reasonableness of a fee award, it must do so with reference to specific—largely factual—factors, and it cannot ignore or alter the

terms of an enforceable fee agreement. In this case the district court properly evaluated the reasonableness of the fees it did award, but it erred in arbitrarily limiting fees in contravention of the parties' Agreements.

For the foregoing reasons, Dorsey and Strohm respectfully request that this Court affirm the district court's grants of summary judgment, affirm its award of attorneys' fees, but remand with instructions to the trial court to (1) award reasonable fees and expenses incurred in the Criminal Case after February 27, 2009; (2) award reasonable fees and expenses incurred in the Collection Case after August 10, 2010, including fees and expenses on this appeal; and (3) apply the contractually-agreed-upon 18 percent interest rate to unpaid fees in the Collection Case.

## ARGUMENT IN RESPONSE TO APPELLANT'S BRIEF

### I. THE DISTRICT COURT CORRECTLY DETERMINED THAT STROHM IS ENTITLED TO INDEMNIFICATION FROM CLEARONE UNDER THE UTAH REVISED BUSINESS CORPORATION ACT. (Appellant Argument Issue III).

ClearOne contends that the district court erred in ordering mandatory indemnification under the Utah Revised Business Corporation Act because ClearOne's corporate *bylaws* bar it from indemnifying *directors* who have not met the standard of conduct established by § 902. *See* App. Br. at 18-20. The Court should reject this argument because it relies on misreadings of both the Act and ClearOne's bylaws.

### A. The Statutory Scheme

The Utah Revised Business Corporation Act establishes both permissive authority for corporations to indemnify officers and directors for litigation expenses, and certain circumstances under which they *must* do so. The policy underlying the indemnification statutes (which every state has in one form or another) is

> to promote the desirable end that corporate officials will resist what they consider unjustified suits and claims, secure in the knowledge that their reasonable expenses will be borne by the corporation they have served if they are vindicated, and to encourage capable [men and women] to serve in the knowledge that expenses incurred by them in upholding their honesty and integrity as directors will be borne by the corporation they serve.

*Baker v. Health Mgmt. Sys., Inc.*, 264 F.3d 144, 151 (2d Cir. 2001) (quoting *Chamison v. Healthtrust, Inc.*, 735 A.2d 912, 925 n.45 (Del. Ch. 1999)) (internal quotation marks omitted). To that end, the Act establishes both permissive and mandatory indemnification, and also grants courts discretionary authority to order indemnification when they deem proper.

Utah Code Ann. § 902 establishes the outer bounds of permissive indemnification, providing that a corporation "*may* indemnify an individual made a party to a proceeding because he is or was a director" if, generally speaking, the director conducted himself in good faith and reasonably believed his conduct was lawful and not opposed to the corporation's interests. Utah Code Ann. § 16-10a-902(1) (emphasis added).

Section 903, in contrast, establishes mandatory indemnification, providing that

> Unless limited by its articles of incorporation, a corporation *shall* indemnify a director who was successful, on the merits or otherwise, in the defense of any proceeding, or in the defense of any claim, issue, or matter

> in the proceeding, to which he was a party because he is or was a director of the corporation, against reasonable expenses incurred by him in connection with the proceeding or claim with respect to which he has been successful.

*Id.* § 16-10a-903 (emphasis added). Section 905 establishes the mechanism for enforcement of indemnification rights, providing that a director may apply for court-ordered indemnification, and that the court "shall order indemnification" as well as "reasonable expenses incurred to obtain court-ordered indemnification" if the director demonstrates entitlement to mandatory indemnification under § 903. *Id.* § 905(1).

Section 905(2) establishes separate authority for court-ordered indemnification independent of the other statutory standards. It empowers the court, in its discretion, to order indemnification if it "determines that the director is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, whether or not the director met the applicable standard of conduct set forth in Section 16-10a-902." *Id.* § 905(2).

Finally, section 907 governs indemnification of officers, as opposed to directors. It provides that officers are entitled to mandatory and court-ordered indemnification "in each case to the same extent as a director," *id.* § 16-10a-907(1), and that a corporation "may also indemnify . . . an officer . . . who is not a director to a greater extent, if not inconsistent with public policy," *id.* § 907(3).

Read together, the Act's indemnification provisions create a coherent scheme that establishes minimum standards of mandatory indemnification, sets outer limits on permissive indemnification, and grants courts discretion to order indemnification where it is justified. Consistent with the policy of providing reasonably certain protection to

directors and officers, the statutes only allow a corporation to limit mandatory indemnification through its articles of incorporation.

### B. ClearOne's Argument Relies On Misreadings of the Act and ClearOne's Bylaws.

ClearOne contends that it is not obligated to indemnify Strohm because of a limitation in its *bylaws* that applies to *directors*. This argument is based on a plain misreading of the Act. Sections 903, 905, and 907 do allow a corporation to limit its duty of indemnification, but only by means of a provision in "*its articles of incorporation.*" (emphasis added). ClearOne assumes that this plain statutory restriction on corporate power is not meaningful. It admits that there is no restriction on mandatory indemnification in its Articles of Incorporation. Instead, ClearOne argues for a limitation from a more general category of "corporate governance documents." App. Br. at 19.

But ClearOne has offered no basis to suggest that the statute means anything other than what its plain language says. Where the legislature "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislature] acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). In other portions of the Act, the Utah Legislature has referenced both "articles of incorporation" and "bylaws." *See, e.g.,* Utah Code Ann. § 16-10a-907(3). It is accordingly clear that the Legislature's reference solely to "articles of incorporation" in § 903 is meant to exclude other corporate governance documents like bylaws. Because ClearOne cannot point to any provision of

its articles of incorporation limiting Strohm's right to indemnification, the district court did not err in ordering mandatory indemnification.[4]

ClearOne's argument also requires a plain misreading of its own bylaws. The bylaw on which ClearOne relies to attempt to limit its duty to indemnify an officer (§ 5.1) by its terms applies only to directors. Section 5.1—not coincidentally entitled "Indemnification of Directors"—states: "The corporation shall not indemnify a *director* under this section unless" he meets certain standards. (R.2077, App. Br. at 19) (emphasis added). In fact, ClearOne has a separate bylaw that applies specifically to indemnification of officers. That bylaw, § 5.3, contains none of the limitations of § 5.1. Rather, it tracks the language of Utah Code Ann. § 16-10a-907, providing that the "board of directors may indemnify and advance expenses to any officer . . . who is not a director of the corporation to any extent consistent with public policy." (R.2078). Of course, Strohm was a ClearOne officer, not a director.

ClearOne avoids all reference to Bylaw § 5.3 in its brief, nor does it attempt to address the statute's exclusive reference to "articles of incorporation." It simply glosses over these crucial differences between the treatment of corporate directors and officers. The Court should not be misled. By its plain language, the Utah Revised Business Corporation Act does not allow a corporation to limit its duty to indemnify by way of bylaws; any such limitation must be in the articles of incorporation. Even if a bylaw

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[4] For the same reason, ClearOne cannot rely on a post-hoc resolution by its Board of Directors to limit its duty of indemnification. *See* App. Br. at 20. Only a limitation in the articles of incorporation is effective.

were enough, ClearOne relies on a bylaw that, by its terms, does not apply to Strohm and ignores the relevant bylaw regarding officers, which would allow indemnification.

Third, even if ClearOne's arguments were otherwise correct (which they are not), § 905(2) of the Act gives the trial court broad residual authority to order indemnification when it deems proper, "in view of all the relevant circumstances." Section 905(2) provides:

> [I]f the court determines that the director [or officer, in accordance with § 907,] is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, whether or not the director met the applicable standard of conduct set forth in Section 16-10a-902 or was adjudged liable as described in Subsection 16-10a-902(4), the court may order indemnification as the court determines to be proper . . . .

As the statutory language makes clear, this section grants the district court broad, discretionary authority. It specifically sets aside other statutory standards, simply directing the court to consider "all the relevant circumstances" and to craft a remedy "as the court determines to be proper." The Official Commentary to the Act bolsters this view, explaining that "the court has general power to grant indemnification under this section." *See* Addendum B, Official Commentary to the Utah Revised Business Corporation Act 397.

Because of the discretionary nature of the remedy, an indemnification order under section 905(2) should be reviewed for abuse of discretion rather than legal error. *See, e.g., Ehlinger v. Hauser*, 785 N.W. 2d 328, 364 (Wis. 2010) (Prosser, J., concurring in part and dissenting in part) (applying Wis. Stat. § 180.0854(2)(b), which, like section 905(2), allows court-ordered indemnification if "the director or officer is fairly and

reasonably entitled to indemnification in view of all the relevant circumstances"); *Myakka Valley Ranches Improvement Assoc., Inc. v. Bieschke*, 610 So. 2d 3, 4 (Fla. Ct. App. 1992) (applying similarly-worded Florida statute).

In this case, the district court did not abuse its discretion in determining that Strohm was entitled to indemnification. Judge Hilder considered not only the statutory standard for mandatory indemnification, but also ClearOne's multiple agreements to pay Strohm's attorney's fees. He reviewed clear testimony of the parties' understandings and intentions in entering into those agreements, as well as evidence of their subsequent course of conduct. He ultimately concluded that in light of Strohm's near-complete success in defending against the criminal charges against her, "the indemnification statutes for officers, and the engagement agreements," ClearOne had "both a statutory responsibility and a contractual obligation it voluntarily incurred" to indemnify Strohm. (R.5153). Thus, the district court's indemnification decision ultimately rested on a constellation of factors—legal, equitable, and factual—reflecting a sound exercise of discretion in light of all relevant circumstances.[5]

Accordingly, this Court should decline ClearOne's invitation to reexamine each and every aspect of the district court's decision for legal error. ClearOne can point to no

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5 For this reason, this Court can and should review the district court's decision for abuse of discretion under section 905(2), even though the court may not have explicitly cast its order as arising under that portion of the statute. *Cf. Ehlinger*, 785 N.W.2d at 364 (Prosser, J., concurring in part and dissenting in part).

portion of the record showing an abuse of discretion by Judge Hilder, and the Court should accordingly affirm.

## II. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON DORSEY AND STROHM'S CONTRACT CLAIMS.

The district court's Judgment was also based on its determination that the Engagement Agreements required ClearOne to pay for Strohm's defense in the Criminal Case (including reasonable attorneys' fees), and required ClearOne to pay interest on unpaid invoices. (R.2967-2968).

ClearOne attacks these determinations by the district court with a series of interpretive and "policy" arguments. Reduced to their essence, these arguments are simply that the court erred in its interpretation of the Engagement Agreements, or that the Agreements could not be enforced as written. What ClearOne's arguments avoid, however, is any discussion of the procedure the trial court followed in granting summary judgment, or any discussion of the undisputed evidence presented to the court in connection with summary judgment.

### A. The District Court Correctly Determined There Was No Genuine Issue of Material Fact About the Intention and Meaning of the Engagement Agreements.

#### 1. ClearOne Offers No Evidence to Demonstrate a Genuine Issue of Material Fact. (Appellant Argument Issues IV, V, VI, IX).

This Court can and should affirm the district court's grant of summary judgment without delving into the details of ClearOne's interpretive attacks. Early in this case the district court determined that the Engagement Agreements were ambiguous as to material

matters. (R.2957). Having determined that the Engagement Agreements were ambiguous, the court allowed the parties to conduct discovery. After the close of discovery, Dorsey and Strohm renewed their motion for summary judgment on the Engagement Agreements, and presented undisputed evidence of the parties' intentions and understanding of the Agreements.

The district court's summary judgment order was based on that extrinsic evidence of the parties' intent—and because that evidence stood uncontradicted, the district court properly granted summary judgment. In arguing before the district court, and this Court, ClearOne has largely agreed with the determination that the Engagement Agreements are ambiguous. *See, e.g.,* App. Br. at 20-22, 36. ClearOne's "interpretive" attacks on the district court's order are based on the unstated assumption that the court should ignore the undisputed extrinsic evidence in favor of ClearOne's interpretive principles. This approach is clearly contrary to Utah law, as set forth in detail below. In this appeal ClearOne does not attack the district court's determination that there was no genuine issue of material fact. And, in any event, ClearOne has failed to point to any record evidence from which a reasonable fact finder could reach a conclusion contrary to the district court's, and each of its arguments thus fails as a matter of law.

As this Court recently reiterated, a "'contract's interpretation may be either a question of law, determined by the words of the agreement, *or a question of fact, determined by extrinsic evidence of intent.*'" *Meadow Valley Contractors, Inc. v. Dep't of Transp.*, 2011 UT 35, ¶ 63, ---P.3d--- (Utah 2011) (quoting *Kimball v. Campbell*, 699

P.2d 714, 716 (Utah 1985) (emphasis in *Meadow Valley*). Contractual interpretation becomes a question of fact when the court determines that the contract is ambiguous. *See id.*, ¶ 64. In this case, the district court concluded that the parties' Agreements were facially ambiguous. (R.2957). Consequently, the proper interpretation of the Agreements became an issue of fact, and the court correctly turned to extrinsic evidence to determine the parties' intent. (R.2960).

The most crucial evidence was the deposition testimony of Michael Keough—ClearOne's CEO at the time both engagement letters were signed and, as the district court noted, "the only witness [ClearOne had] identified on the critical engagement agreement issues." (R.2958). Keough's testimony was the *only* evidence probative of ClearOne's intent in entering into the engagement agreement with Dorsey. (R.2709).

Based on Keough's testimony (and other extrinsic evidence offered), the district court determined that (1) the two engagement letters formed "one agreement, the latter updating and supplementing the former" (R.2964); (2) the Agreements bound ClearOne to pay for Strohm's defense in the Criminal Case (R.2967); (3) the Agreements required ClearOne to pay 18 percent interest on unpaid fees in the Criminal Case (R.2966); (4) the Agreements bound ClearOne to pay attorneys' fees and costs incurred in any action to collect unpaid fees (R.2968); and (5) Dorsey and Strohm were entitled to "judgment for interest" in the Collection Case. (*Id.*).

Because there was no evidence sufficient to raise a genuine issue of material fact with respect to those conclusions, the district court correctly entered summary judgment.

*See* Utah R. Civ. P. 56. This Court reviews the grant of summary judgment for correctness, *Glenn v. Reese*, 2009 UT 80, ¶ 6, 225 P.3d 185 (Utah 2009), examining "only whether the district court erred in applying the governing law and whether the district court correctly held that there were no disputed issues of material fact." *Salt Lake County v. Holliday Water Co.*, 2010 UT 45, ¶ 14, 234 P.3d 1105 (Utah 2010) (alterations omitted).[6] Moreover, when a "contract is ambiguous and the trial court proceeds to find facts respecting the intentions of the parties based on extrinsic evidence, then [the appellate court's] review is strictly limited." *Meadow Valley Contractors*, 2011 UT 35, ¶ 63 (citation and alteration omitted). In attacking the district court's decision, ClearOne bears the burden of pointing to record evidence sufficient to raise material issues of fact. *See R&R Energies v. Mother Earth Indus., Inc.*, 936 P.2d 1068, 1078 (Utah 1997) (affirming grant of summary judgment because of appellant's "utter failure . . . to demonstrate the existence of any genuine issues of material fact"); *see also Hamilton v. Parkdale Care Ctr., Inc.*, 904 P.2d 1110, 1113 (Utah Ct. App. 1995) ("When challenging a trial court's grant of summary judgment . . . the moving party bears the burden of (1) identifying the disputed issue(s) of fact; and (2) demonstrating how such facts are material.). ClearOne has completely failed to carry that burden.

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6 Whether the engagement agreement is ambiguous is a question of law reviewed for correctness, *Tangren Family Trust v. Tangren*, 2008 UT 20, ¶ 10, 182 P.3d 326 (Utah 2008), but ClearOne does not take issue with the district court's conclusion on this point. In fact, ClearOne argues extensively that the agreement is ambiguous; it simply criticizes the district court's resolution of that ambiguity. *See, e.g.*, Appellant's Br. at 20-22.

ClearOne argues, for example, that the Engagement Agreements should be construed against Dorsey, *see* App. Br. at 21, and contends that the district court ignored the putative plain meaning of certain terms in the letters, such as "litigation" (*id.* at 22) and "updated" (*id.* at 26). Arguments such as these wholly miss the mark because the district court's grant of summary judgment was based on factual evidence of the parties' intent, not its own legal interpretation of the Agreements' language. *See Meadow Valley Contractors*, 2011 UT 35, ¶ 63. At no point in attacking the district court's interpretation of the Agreements does ClearOne confront the explicit, unrebutted testimony of Michael Keough—the sole evidence of ClearOne's understanding and intent in entering into the Engagement Agreements with Dorsey and Strohm. Because ClearOne has failed to raise any genuine issue of material fact, this Court should affirm the district court's grant of summary judgment.

### 2. ClearOne's Interpretive Arguments Fail. (Appellant Argument Issues IV, VI, IX)

Even if the Court countenances ClearOne's various arguments about the correct interpretation of the parties' Agreements—notwithstanding that they fail to raise any issue of material fact—each of ClearOne's arguments fails on its own terms.

#### a) *The Agreements Should Not Be Construed Against Dorsey.*

ClearOne contends that the district court erred in concluding the Engagement Agreements included Strohm's criminal proceedings because the engagement letters should have been construed against their attorney-draftsman. *See* App. Br. at 20-23. The district court considered and rejected this precise argument in the proceedings below,

(R.2959), and rightly so, as it is squarely foreclosed by the decisions of this Court. In *Meadow Valley Contractors, Inc. v. Department of Transportation*, the Court explained: "If [a] contract is ambiguous, we seek to resolve the ambiguity by looking to extrinsic evidence of the parties' intent. If extrinsic evidence does not resolve the ambiguity and uncertainty remains, *only then* will we resolve the ambiguity against the drafter." 2011 UT 35, ¶¶ 64, 69 (emphasis in original) (citing cases). Because the district court was able to resolve the ambiguity in the engagement letters based on extrinsic evidence, it properly declined to employ the "last resort" device of construing the agreement against Dorsey. *Express Recovery Servs. Inc. v. Rice*, 2005 UT App 495, ¶ 3 n.1, 125 P.3d 108 (Utah Ct. App. 2005).[7]

b) *The District Court Correctly Determined that the Two Engagement Letters Formed a Single Agreement.*

ClearOne argues that the district court "conclusorily ruled" that the 2004 Engagement Agreement (the Dorsey engagement letter) incorporated the terms of the earlier 2003 Engagement Agreement (the Bendinger letter), including the provisions for attorneys' fees and interest. It contends that the district court ignored the true meaning of

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[7] To the extent they are inconsistent with the clear principle set forth in *Meadow Valley*, the earlier cases on which ClearOne relies cannot control. In any event, they are distinguishable. In *Phillips v. Smith*, while the Court recited the principle that contracts are strictly construed against the drafter, it never employed that principle to resolve an ambiguity in the contract; it simply reached an interpretation as a matter of law. *See* 768 P.2d 449, 451-52 (Utah 1989). In *Ellsworth v. Am. Arbitration Assoc.*, 2006 UT 77, 148 P.3d 983 (Utah 2006), the issue was not interpretation of the terms of an agreement, but whether the party against whom the contract was to be enforced had assented to it at all. *See id.* at ¶ 13. The Court's decision ultimately turned on the fact that there was no evidence of intent. *See id.* at ¶¶ 13, 17-18.

the word "update," App. Br. at 26, and that the 2004 Engagement Agreement was not sufficiently clear because "[n]o recipient of the Dorsey engagement letter would reasonably understand . . . what terms actually governed Dorsey's representation." App. Br. at 25. The primary failing of these arguments is that Michael Keough—the *actual* recipient of the Dorsey letter, who signed it on behalf of ClearOne as its CEO, and whom ClearOne designated as its most knowledgeable corporate representative to testify on this issue—explicitly testified that he understood it to incorporate the material provisions of the 2003 Agreement:

> Q: So when Mr. Marsden is stating in the first paragraph in [the 2004 Engagement Agreement], where he says, "The rest of this letter is intended to serve as the update," did you understand that the purpose of the [2004 Engagement Agreement] was to sort of amend or update certain terms of [the 2003 Agreement] and leave the rest unchanged?
>
> A: Yes.
>
> * * * *
>
> Q: I'll rephrase it. Did you then consider [the 2003 Engagement Agreement] and [the 2004 Engagement Agreement] to be essentially combined as one agreement [the 2004 Agreement] merely updating [the 2003 Agreement]?
>
> A: Yes. I think "update" is the correct word.
>
> * * * *
>
> Q: Okay. And so terms that were not changed or modified in [the 2004 Agreement] would remain terms in [the 2003 Agreement] that ClearOne agreed to, going forward still with Mr. Marsden representing Susie Strohm. Would that be fair?
>
> [Objection omitted]
>
> A. That would have been my expectation, yes.

(R.2730); (*see also* R.2730-31). Because the Agreements were ambiguous, the district court properly relied on this evidence to discern the parties' intent. ClearOne's semantic arguments seek to ignore their own witness' testimony and are irrelevant.

c) *The Terms of the Agreements Did Not Allow ClearOne to Terminate Dorsey's Representation of Strohm.*

ClearOne argues that it terminated its obligation to pay Dorsey's fees in November 2009 by instructing Dorsey to withdraw from its representation of Strohm. As the district court properly concluded, however, the terms of the Engagement Agreements did not grant ClearOne the power of unilateral termination.

First, ClearOne contends that the district court's interpretation improperly assigns two different meanings to the word "your." ClearOne argues that if "your" refers to Strohm and ClearOne in the phrase "your engagement of Dorsey & Whitney," (R.0047) then it must also refer to both parties when it says "we will withdraw from representation upon your request." (R.0048); *see* App. Br. 33-34. This argument fails by its own logic. If, as ClearOne contends, "your" means both ClearOne and Strohm, then *both* parties must request that Dorsey withdraw in order for the request to be effective. Strohm has never made any such request.

More fundamentally, ClearOne's argument ignores the context and the evident meaning of the Agreements construed as a whole. In interpreting a contract, the Court's paramount purpose is of course to ascertain the parties' intent, and in doing so it must "consider each contract provision . . . in relation to all of the others, with a view toward

giving effect to all and ignoring none." *Green River Canal Co. v. Thayn*, 2003 UT 50, ¶ 17, 84 P.3d 1134 (Utah 2003) (alteration in original). Read as a whole, the Engagement Agreements make clear that the power to terminate rested with the client, Strohm, alone. The 2004 Agreement explicitly states that Dorsey would "represent Susie Strohm" and that "ClearOne understands and accepts that all [Dorsey's] professional responsibilities under applicable law are owed solely to Strohm." (R.0047-48). ClearOne simply agreed to be "jointly and severally responsible for payment of all amounts billed." (R.0048). Thus, as Judge Hilder correctly concluded, it is "crystal clear from the [2004] letter that Dorsey represented Susie Strohm, and ClearOne's role was as third-party payor for those services." (R.5151).

Furthermore, as the district court noted, under ClearOne's reading the 2004 Dorsey letter violates the Utah Rules of Professional Responsibility. Such constructions are to be avoided. *See Peirce v. Peirce*, 994 P.2d 193, 199 (Utah 2000). Allowing ClearOne power to force Dorsey to withdraw from representing Strohm would violate Utah R. Prof. Cond. 1.16(b)[8] It would also violate Rule 1.8(f), which provides that an attorney cannot accept compensation for representing a client from a third party unless "there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship."

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8 *See* R.5151 (stating that under Utah R. Prof. Cond. 1.16(b), "Dorsey was probably not ethically permitted to withdraw given the status of the case without leave of Court").

ClearOne's only response to this concern is to assert that it "never suggested . . . that it could force a severing of the attorney-client relationship between Strohm and Dorsey." App. Br. at 33. But that is exactly what ClearOne demanded. ClearOne wrote: "ClearOne requests that you withdraw from any further representation under the Dorsey Engagement Letter immediately." (R. 4872). The district court properly concluded that ClearOne lacked the power to unilaterally terminate the attorney-client relationship in this way.

ClearOne also complains that, unless it is allowed to terminate its obligations unilaterally, it will be at Strohm's mercy, as she will continue the fight in the Criminal Case endlessly: through rehearing, petitions for certiorari, and so on. Of course, this concern is belied by Strohm's actual conduct, particularly her decision not to seek further appeals from her conviction.

Moreover, to the extent the Court is concerned about the parties' incentives, ClearOne's are significantly more troubling than Strohm's. Throughout this litigation, ClearOne has made plain its erroneous view that anything less than a complete acquittal of Strohm relieves it of any statutory or contractual liability for her defense. In light of this, it is no wonder that ClearOne would repudiate its contractual obligations, in the hope of damaging Strohm's ability to exonerate herself. The Court should not enable it to do so by adopting an untenable interpretation of the Engagement Agreements.[9]

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9 ClearOne also argues that the agreement must be read as granting it the power to unilaterally terminate because the engagement letter must be strictly construed against

## B. The District Court Correctly Concluded the Agreements are Enforceable (Appellant Argument Issues I, II, VIII).

ClearOne argues on appeal, just as it did before the district court, that various terms of the parties' agreement are unenforceable for reasons of public policy. First, it contends that Dorsey cannot recover fees attributable to its efforts to collect the fees owed under the Engagement Agreements because Utah public policy prohibits recovery of fees by a pro se litigant. It then argues that Utah public policy prohibits use of corporate funds to indemnify Strohm for fees attributable to her perjury conviction. Finally, it argues that an 18 percent interest rate in an attorney fee agreement is unreasonable and therefore unenforceable. Each of these arguments fails for the reasons set forth below.

### 1. *Jones Waldo* Does not Prohibit Recovery of Dorsey's Fees.

ClearOne contends that its obligation to pay Dorsey's fees incurred in enforcing the Engagement Agreements is not enforceable under this Court's decision in *Jones, Waldo, Holbrook & McDonough v. Dawson*, 923 P.2d 1366 (Utah 1996). ClearOne is mistaken. As the district court correctly recognized, several crucial factors distinguish this case, and *Jones Waldo* accordingly does not control.

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Dorsey. As set forth in Part II.A.2.a above, however, ClearOne misstates the law on this point. The Court only construes a contract against its drafter if ambiguity cannot be resolved by extrinsic evidence of intent. *See Meadow Valley Contractors*, 2011 UT 35, ¶¶ 64, 69. In this case the district court did not rule that the withdrawal term was ambiguous, *see* R. 5150-5151, but even if it had done so, ClearOne has pointed to no extrinsic evidence supporting its interpretation.

In *Jones Waldo* the plaintiff law firm had represented the defendant in a divorce proceeding. Shaw, the attorney who handled the case, had initially told Dawson, his client, that his fees would total approximately $15,000-$18,000. *Id.* at 1368. By the time of trial, however, he had billed her for $33,901 and she had fallen behind in her payments. *Id.* at 1369. When Dawson's ex-husband appealed from the divorce judgment, Shaw ran up another $12,586 in fees, filed an attorney's lien on Dawson's house and alimony payments, then withdrew from representation for nonpayment. *Id.* When Dawson hired substitute counsel, Shaw refused to transfer her file "as a lien against her unpaid fees." *Id.* The Jones, Waldo firm then sued Dawson to recover its fees (which well exceeded the value of the recovery it had obtained for her in the underlying action), as well as fees and costs incurred in the collection action. *See id.* at 1368-69.

Taking account of these "disturbing" circumstances, *id.* at 1375, this Court held that the Jones, Waldo firm could not recover its attorney's fees as a litigant representing itself in a collection action against its own client. The decision rested on several factors: (1) the "general rule that pro se litigants should not recover attorney fees," *id.* at 1374; (2) a concern over incentivizing litigation, *id.* at 1375; and (3) the "most serious" concern that a pro se litigant has no incentive to limit the fees it incurs in a collection action, *see id.*

As this Court has subsequently made clear, however, *Jones Waldo* and the case on which it primarily relied, *Smith v. Batchelor*, 832 P.2d 467 (Utah 1992), do not establish

a "blanket prohibition of attorney fee awards to pro se litigants." *Softsolutions, Inc. v. Brigham Young University*, 2000 UT 46, ¶¶ 42, 44, 1 P.3d 1095 (Utah 2000). Instead, Utah courts are required to consider the facts and circumstances of each case in light of the underlying policy concerns to determine whether the rule applies. *See Softsolutions*, 2000 UT 46, ¶ 44 (distinguishing *Jones Waldo*). As Judge Hilder correctly recognized, several key facts and considerations distinguish this case, rendering the rule of *Jones Waldo* inapplicable.

Most importantly, Dorsey is not solely proceeding pro se. Dorsey represents a client in this case, Susie Strohm, and the primary purpose of its representation is, and always has been, to vindicate *her* rights. The Complaints in this action (and this appeal) involve several claims that are Strohm's alone. Moreover, the claim for collection costs under the Engagement Agreement is in all relevant respects Strohm's claim as much as it is Dorsey's. Although ClearOne is the third-party payor, who agreed to be primarily liable for payment under the Agreements, Strohm is "jointly and severally responsible" for unpaid fees, including those incurred in the collection action. (R0043, 48). Accordingly, in seeking its fees from ClearOne, Dorsey is also representing the interests of its client. In contrast, each of the lawyer-litigants in *Batchelor* and *Jones Waldo* represented only his own interests. *See Batchelor*, 832 P.2d at 469; *Jones Waldo*, 923 P.2d at 1369. The distinction is material for two major reasons.

First, because Dorsey represents Strohm in this case and not ClearOne, the policy concerns underlying the Court's decision in *Jones Waldo* are largely ameliorated. Dorsey

is not operating without client control, and there are meaningful constraints on the scope and goals of its representation. *Cf. Jones Waldo*, 923 P.2d at 1375. And, because Dorsey is acting in furtherance of Strohm's rights under the engagement agreement, it cannot be said that it is pursuing litigation "as a way to generate fees rather than to vindicate personal claims." *Id.* These factors establish natural and meaningful limits on Dorsey's fees.

Indeed, application of the *Jones Waldo* rule in this case would have an effect precisely opposite the one intended—it would promote duplication of legal work and increases in legal fees. Dorsey attorneys are positioned to most efficiently pursue Strohm's claims in action because they are familiar with the underlying facts and proceedings. If Dorsey cannot at the same time pursue its parallel claims, pro se, it would be encouraged to retain its own outside counsel to do so. The fees of Dorsey's outside counsel would then be recoverable, but the total fees incurred would be multiplied. One of the central concerns articulated in *Jones Waldo*—the "incentive to limit the total fee"—thus supports recovery of fees in this case. 923 P.2d at 1375.

Second, as this Court clarified in *Softsolutions*, the crucial element on which the rule of *Jones Waldo* turns is whether the pro se litigant "incurs" attorney's fees. In *Batchelor* and *Jones Waldo*, the Court explained, "neither the law firm nor the attorney-litigant actually paid or became liable to pay consideration in exchange for legal representation and thus did not incur attorney fees in the action." *Softsolutions*, 2000 UT 46, ¶ 43. In this case, however, Strohm is jointly and severally liable along with

ClearOne, and she will "bec[o]me liable to pay" Dorsey's fees to the extent Dorsey is unable to collect from ClearOne. *Id.* Thus, Strohm has "incurred" attorney's fees in the collection action and she is accordingly entitled to recover them in accordance with the terms of the Engagement Agreements and the rule of *Softsolutions*. *See* 2000 UT 46, ¶ 44, 46.[10]

There is another crucial distinction between this case and *Jones Waldo*. In *Jones Waldo*, the plaintiff law firm was suing its own unsophisticated client, after encumbering virtually all of her available assets and retaining her file. *See* 923 P.2d at 1368-69. The Court was therefore concerned to avoid enhancing the law firm's advantage over its client even further. *See id.* at 1374. No such concerns are present here. Dorsey is not suing its own client and has no unfair advantage over ClearOne—a large, well-funded public company with entire teams of its own lawyers. None of the material considerations underlying the decision in *Jones Waldo* is present here, and there is accordingly no reason to extend the rule of *Jones Waldo* to this case.

### 2. Strohm's Conviction Does Not Prohibit Enforcement of the Dorsey Engagement Agreement.

ClearOne insists that Utah public policy requires that it be freed of its knowing and voluntary contractual obligation to pay Dorsey's fees because Strohm was convicted

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10 Indeed, the Revised Business Corporations Act recognizes that officers and directors ordinarily incur fees and costs in seeking indemnification, which is why Utah Code Ann. § 16-10-905(1) mandates that such expenses be awarded when a director or officer succeeds in obtaining court-ordered indemnification.

of one count of perjury. *See* App. Br. 14-17. It bases this argument on Utah Code Ann. § 16-10a-902, which provides:

> (1) Except as provided in Subsection (4), a corporation may indemnify an individual made a party to a proceeding because he is or was a director, against liability incurred in the proceeding if:
> (a) his conduct was in good faith; and
> (b) he reasonably believed that his conduct was in, or not opposed to, the corporation's best interests; and
> (c) in the case of any criminal proceeding, he had no reasonable cause to believe his conduct was unlawful."

ClearOne contends that it is "literally without authority" to indemnify an officer who does not satisfy this standard of conduct. App. Br. 16 (emphasis in original). It claims that Strohm's perjury conviction necessarily means she did not meet the statutory standard of conduct, and public policy prohibits enforcement of its agreement to pay her attorney's fees. For several simple reasons, ClearOne's self-serving reading of the statute cannot be adopted.

First, and most obviously, § 902 applies by its terms to directors, not officers. As an officer, Strohm's claim is governed by § 907, not § 902. Section 907 does indeed link indemnification of officers with that of directors, but it explicitly establishes broader authority for indemnification of officers without reference to statutory standards of conduct. Section 907(3) provides that—in contrast with indemnification of directors—a "corporation may . . . indemnify and advance expenses to an officer . . . who is not a director *to a greater extent,* if not inconsistent with public policy, and if provided for by its articles of incorporation, bylaws, general or specific action of its board of directors, *or*

*contract*." (emphasis added). The Official Commentary to § 907 removes any doubt about the intended meaning of this provision:

> Section 907(3) authorizes indemnification for officers, employees, fiduciaries and agents who are not directors, *but neither requires nor prescribes standards for their indemnification and expressly states that their indemnification may be broader than the right of indemnification granted to directors*.

Addendum B, Official Commentary 398 (emphasis added). The district court properly relied on the statutory language and the Official Commentary to conclude that "there is ... no absolute public policy bar to ClearOne's indemnification or reimbursement of Susie Strohm's fees." (R.5152).

ClearOne makes no reference to § 907(3) or the Official Commentary in this appeal, nor does it criticize the district court's reliance on those sources. Instead, it simply inserts the phrase "or officer" into its quotation from § 902 and asserts that the statute applies to Strohm, once again attempting to rely on sleight of hand to make out its statutory argument. *See* App. Br. 14. The district court correctly rejected this argument below, and this Court should do so as well.

Second, even if § 902 did directly apply here, ClearOne's argument would still fail because it failed to show that Strohm did not meet the statutory standard of conduct. ClearOne argues in essence that Strohm failed to meet the standard of conduct by definition, simply because she was convicted of perjury. But again, ClearOne omits from its discussion a crucial portion of the statute. Section 902(3) provides: "The termination of a proceeding by judgment, order, settlement, conviction, or upon a plea of *nolo*

*contendere* or its equivalent is not, of itself, determinative that the director did not meet the standard of conduct described in this section."[11] ClearOne must accordingly point to some affirmative evidence beyond the mere judgment of conviction that would establish Strohm's lack of good faith. It has utterly failed to do so. ClearOne now offers nothing but a bare assertion that Strohm acted in bad faith, and its argument must fail.

Moreover, even if it were determined that Strohm did not meet the statutory standard of conduct, it would not render unenforceable ClearOne's agreement to pay her attorney's fees. Section 902 cannot be interpreted as establishing an absolute public policy against indemnification whenever the statutory standard is not met, because another section of the statute—§ 905(2)—explicitly *authorizes* indemnification "*whether or not the director met the applicable standard of conduct.*" It follows that public policy allows indemnification in at least some cases where the director has not met the statutory standard of conduct.

Finally, independent—and very clear—public policy counsels against the rule ClearOne advocates. If accepted, ClearOne's argument would establish a contingent fee arrangement for criminal representation, which is strictly prohibited by Utah R. Prof. Cond. 1.5(d)(2).

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[11] Again, the Official Commentary removes any doubt about the intention behind the statutory language: "The purpose of section 902(3) is to reject the argument that indemnification is automatically improper whenever a proceeding has been terminated on a basis that does not exonerate the director claiming indemnification." Addendum B, Official Commentary 396.

Even if Utah Code Ann. § 16-10a-902 applied to Strohm—which it does not—ClearOne has failed to establish that Strohm did not meet the statute's standard of conduct. And even if it had done so, the statute does not establish any public policy that excuses ClearOne from its contractual obligations. The Court should accordingly affirm the district court's grant of summary judgment.

### 3. The Agreed-Upon Interest Rate of 18% Is Enforceable.

Finally, ClearOne argues that the Engagement Agreements' provision for 18 percent interest on unpaid fees cannot be enforced as a matter of public policy because it is unreasonable under Utah R. Prof. Cond. 1.5. ClearOne is mistaken. Rule 1.5 does not authorize the courts to rewrite attorney fee agreements.

The reasonableness of attorneys' fees under Rule 1.5 is committed to the "broad discretion" of the trial court and reviewed for abuse of that discretion. *See Dixie State Bank v. Bracken*, 764 P.2d 985, 990 (Utah 1988). In this case the district court made a reasonableness determination, which ClearOne has also attacked at length, and which is discussed in detail below.

Whether the interest provision of the Agreements is enforceable, on the other hand, is a separate question of contract law. As this Court has made clear, absent extraordinary circumstances, parties may contract freely and will be bound by the terms upon which they voluntarily agree. It "is not for the courts to assume the paternalistic role of declaring that one who has freely bound himself need not perform because the bargain is not favorable." *Bekins Bar V Ranch v. Huth*, 664 P.2d 455, 459 (Utah 1983).

This principle applies with equal force to attorney fee agreements. *See Dixie State Bank*, 764 P.2d at 988; *see also Equitable Life & Cas. Ins. Co. v. Ross*, 849 P.2d 1187, 1194 (Utah Ct. App. 1993) ("If provided for by contract, attorney fees are awarded in accordance with the terms of that contract [and] such an award is a matter of legal right.") (citing *id.*).

It bears emphasis that ClearOne does not argue that the interest provision is unconscionable.[12] Absent such an argument, there is no basis for a court to alter the Agreements, and indeed, ClearOne cites no authority for its contention that Utah R. Prof. Cond. 1.5 allows the district court to delete a provision from a fee agreement. Nor could it, for this Court has steadily reiterated that "[i]f a contract provides for attorney fees, the award 'is allowed only in accordance with the terms of the contract.'" *Softsolutions*, 2000 UT 46, ¶ 41.[13]

With respect to contractual interest provisions, Utah has no usury law, and parties may agree to any rate. *See, e.g., Lewis*, 2010 UT App 40, ¶ 3 (citing Utah Code Ann. §

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12 Unconscionability is a question separate from reasonableness under Rule 1.5. *See, e.g., Sosa v. Paulos*, 924 P.2d 357, 360-61 (Utah 1996) (discussing unconscionability inquiry). ClearOne did argue in the proceedings below that the interest provision was unconscionable, and the district court correctly rejected that argument. (R. 5160-61). ClearOne has not pursued its unconscionability argument on appeal, and that issue is accordingly not before the Court.

13 The courts certainly police attorney fee agreements with additional sensitivity, particularly in order to ensure that the unique dynamics of the attorney-client relationship do not generate an unfair advantage over the client. In this case, of course, ClearOne is not Dorsey's client, but a sophisticated, well-funded, and fully represented corporate entity.

15-1-1(1)). As the district court noted, "18% interest is an extremely common interest rate in collection matters in the state of Utah," and "much higher rates are charged and enforced on a daily basis." (R.5161). More importantly, ClearOne knowingly and voluntarily agreed to pay 18 percent interest on Dorsey's unpaid fees. Michael Keough testified unequivocally that when he signed the 2004 Engagement Agreement on behalf of ClearOne, he understood that "any invoices that were sent by Marsden at his new firm, Dorsey & Whitney, that remained unpaid after 30 days would bear interest at a rate of 18 percent per annum from the date billed until paid." (R.2731).

While the overall reasonableness of Dorsey's fees is subject to inquiry, the district court correctly recognized that the interest term in the Engagement Agreements was an enforceable contractual provision, as the parties intended it to be. (R.2966, 5160-61). Consequently, the district court was right to award 18 percent interest on unpaid fees incurred in the Criminal Case.

## III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CALCULATING ITS REASONABLE ATTORNEYS' FEE AWARD.

Once the district court found that ClearOne had legal obligations to indemnify Strohm under both the Act's indemnification provisions and the Engagement Agreements, the court turned to calculating a reasonable award of those attorney's fees and costs. (R.5162). ClearOne now challenges that calculation on appeal by arguing that Dorsey's fees were (1) excessive in the Criminal Case, and (2) not properly tailored in the Collection Case. (App. Br. at 37, 43). ClearOne's arguments fail, however, because

ClearOne failed to properly marshal the evidence supporting these factual findings, and, the district court's findings are well-reasoned and supported by the evidence.

### A. ClearOne Failed to Properly Marshal the Evidence Regarding the District Court's Factual Findings.

ClearOne's appeal on the reasonableness of the fee award fails to marshal the evidence, and therefore all factual findings made by the district court must be accepted as true. As stated above, in order to challenge a trial court's findings of fact, a party must "marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence." *Mountain States Broadcasting*, 783 P.2d at 553 (internal quotations omitted). The marshaling requirement is "rigorous and strict," *Chen v. Stewart*, 2004 UT 82, ¶ 79 (2004), a "heavy burden" that "appellants often overlook or disregard." *Mountain States Broadcasting*, 783 P.2d at 553. When the duty to marshal is not properly discharged, appellate courts refuse to consider the merits of challenges to the findings, and accept the factual findings as valid. *Id.* at 553-54 (listing cases). Following this Court's guidance, the Utah Court of Appeals has noted that a challenge to a fee award must marshal the evidence, as a trial court's determination that an attorney's fee award is reasonable "is necessarily dependent on the underlying facts and circumstances involved." *See Gilbert Dev. Corp. v. Wardley Corp.*, 2010 UT App 361, ¶ 46, 246 P.3d 131, 146-47.

In ClearOne's challenge to the Criminal Case fee award, ClearOne only cites to two paragraphs of Dorsey's declarations, makes an irrelevant observation about Snow

Christensen's work, and refers broadly to its own expert's declaration. (App. Br. at 40, 42). In calculating the fees for the Criminal Case, however, the district court relied on a far broader range of evidence: the complexity of the Criminal Case, the nature and amount of work needed, and an evaluation of the skill and experience of the lawyers involved compared to similarly-skilled Salt Lake City lawyers, and it further examined the time descriptions submitted by Dorsey. (R.5166-69, 5171-72). These findings were based on multiple, detailed declarations and supporting documents submitted with Dorsey's Petition for an Award of Attorneys' Fees and Costs, (*see* R.3151 (Declaration of William Michael Jr., summarizing experience of attorneys and work performed in the Criminal Case); *see also* R.2975, 3151, 3384, 3407, 3417, 3629), evidence that ClearOne not only fails to marshal, but totally misconstrues by citing only two broad paragraphs from Dorsey's expert declarations. (App. Br. at 40). ClearOne's argumentative assertions are in no way a recitation of the evidence that was "in support of the findings," and therefore ClearOne cannot now challenge the district court's findings on the merits.

### B. The District Court's Calculation of Attorney's Fees is Supported by the Evidence. (Appellant Argument Issue X).

Even though ClearOne's challenges to the reasonableness of the fee awards necessarily fail because of ClearOne's failure to marshal the evidence, those challenges also fail because the district court's decision on these items is supported by ample evidence. The "trial court has 'broad discretion in determining what constitutes a reasonable fee, and [appellate courts] will consider that determination against an abuse-of-discretion standard.'" *Valcarce v. Fitzgerald*, 961 P.2d 305, 315 (Utah 1998) (quoting

*Dixie State Bank* 764 P.2d at 991. Under an abuse-of discretion standard, a trial court's ruling will not be reversed unless the ruling "was beyond the limits of reasonability." *Daines v. Vincent*, 2008 UT 51, ¶ 21, 190 P.3d 1269 (Utah 2008) (quoting *Jensen v. IHC Hosps., Inc.*, 2003 UT 51, ¶ 57, 82 P.3d 1076) (Utah 2003).

**1. The reasonableness of the Criminal Case fee award is supported by the evidence.**

ClearOne challenges the reasonableness of the district court's Criminal Case fee award for reasons including: (1) certain lawyers' rates were set too high; (2) unnecessary travel expenses were required for the counsel retained; and (3) excessive hours were spent on the Criminal Case. However, the evidence fully supports the district court's decisions with regard to these issues, which are well within the "limits of reasonability," and should therefore be affirmed by this Court.

Regarding the appropriateness of the billing rates set for each lawyer, Judge Hilder made a detailed inquiry into the experience level of the lawyers at issue, finding, for example, that William Michael's "skill, experience—and results in this case—persuasively place him in the upper echelon of criminal lawyers handling complex securities matters." (R.5166-67; *see* R.4926).[14] The court then determined Michael's

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14 ClearOne erroneously argues that the district court determined that Marsden's rate would, "except in unusual circumstances . . . be the highest rate." (App. Br. at 38). However, the court's discussion at that point is not making findings regarding reasonable attorneys' fees, but is simply citing certain provisions from the Bendinger and Dorsey letters. In fact, the court expressly states that its citation to those provisions "is for the sole purpose of putting the parties on notice that a reasonable fee determination is within the sound discretion of the trial court." (R. 2965-66).

rate for purposes of its fee award by reference to what a Salt Lake City lawyer with comparable experience would charge, and also relied upon expert evidence to confirm the appropriateness of that rate. (R.5167; see R.5359) Considering that Judge Hilder undertook a similarly detailed analysis for each lawyer, the district court was well within the bounds of its discretion in determining the billing rates as it did. *See Blum v. Stenson*, 465 U.S. 886,895 n.11 (1984) (stating that reasonable rates are rates "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation."). This is especially true in light of ClearOne's failure to acknowledge its own reliance on New York Counsel in this case. (R.5359).

Neither did the district court abuse its discretion in determining the appropriate amounts of travel expenses for which Dorsey would be reimbursed. (See R.6169-71). Judge Hilder found that choosing a Minneapolis-based lawyer was within the arrangement contemplated by the Engagement Letters, again noting that Strohm's lead counsel, William Michael, was "eminently qualified for the task, and the results speak for themselves." (R 5170). However, Judge Hilder made a "reasonable accommodation" of ClearOne's concerns by limiting full travel reimbursement to those travel times that included preparation, reducing other travel time.

Finally, the district court carefully examined the necessity of the work for which Dorsey requested reimbursement. (R.5163). The district court found that Dorsey's hours were higher than those of Snow Christensen (who represented Strohm's co-defendant) because the Joint Defense Agreement allowed Dorsey to utilize its resources and share its

work product with Snow Christensen, which not only resulted in justifiably higher hours by Dorsey, but resulted in a division of labor that in fact saved ClearOne money by avoiding the otherwise necessary duplication that would occur. (See R.5163-64; 4928-30). The district court also looked at the complexity and seriousness of the work done, and the "overall excellent result." (R.5163). All of these findings were well-supported by the declarations and underlying documentation in the record. (See R.2975, 3151, 3384, 3407, 3417, 3629, 4999). Further, it cannot be argued, in comparison with defense costs in similar litigation, that the charges at issue fall outside "limits of reasonability."[15]

**2. The reasonableness of the Collection Case fee award is supported by the evidence. (Appellant Argument Issue XI).**

ClearOne also challenges the reasonableness of the district court's fee award in the Collection Case, but again, the district court did not abuse its discretion, and its determination should not be reversed. ClearOne argues that certain fees awarded stemmed from work on claims in the Collection Case that the Plaintiffs have not yet won on summary judgment (i.e., claims based on the ETA and equity). (See Appellant's Br. at 43). However, the district court specifically found that, although the basis of its award was limited to the engagement agreements and statutory indemnification provisions, the court needed to construe Strohm's ETA to properly rule on intent behind and the

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15 *See e.g.*, *Sun-Times Media Group, Inc. v. Black*, 954 A.2d 380, 385 (Del.Ch. 2008) (four corporate officers incurred $60 million defending charges of mail and wire fraud, money laundering, obstruction of justice, racketeering, and tax violations); *In re Wilmer Cutler Pickering Hale & Dorr LLP*, 2008 WL 5413097, at *1 (Tex. Ct. App. 2008) (CFO incurred legal fees and expenses of approximately $12 million in securities fraud investigation and prosecution).

applicability of the agreements and indemnification provisions. (See R.5174). Further, the work on the equitable theories at issue was "closely interrelated with the work done regarding the successful theories including, specifically, discovery." (R.1575). Finally, the district court did reduce the amount of fees by five percent, to account for work that went toward the equitable claims. (*Id.*)

ClearOne once again sets forth only argumentative assertions that it already argued below, failing to marshal any of the evidence that supports the district court's ruling. (See App. Br. at 45-50). The record, however, well supports the district court's conclusion that discovery concerning the ETA claim, the equitable claims, the Engagement Agreements claim, and the statutory indemnification claim are interrelated and involve common issues. For example, extrinsic evidence was gathered related to whether some payments had been made voluntarily on those Agreements, which not only shed light on the scope of the Agreements, but was also directly tied to several of the equitable claims, including unjust enrichment and estoppel. (See R.2052).[16] Similarly, in the district court's March 2, 2010 Order, the signed ETA was held to be an integral component of establishing that ClearOne understood the scope of the retainer agreement

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16 ClearOne's argument that the application of the Voluntary Payment Rule was in error is similarly unfounded and insupportable. (See App. Br. at 31). ClearOne has not (and cannot) identify anything that forced or compelled ClearOne to voluntarily pay the fees. ClearOne does not dispute that it received invoices from Dorsey, reviewed them, negotiated reductions, and paid fees through March 2008, but instead simply argues that this should be accounted for in the reasonableness award and the district court erred in failing to do so. (See R.5158). However, under an abuse of discretion standard, such unsupported arguments cannot sustain a challenge to a reasoned award.

in the Criminal Case, which had direct bearing on the court's indemnification findings. (R.2962-63).

ClearOne tries to argue that only two depositions and no discovery documents were relevant to the Engagement Agreement claims, (App. Br. at 46-48), but the evidence does not support this assertion. ClearOne's board members testified about their lack of knowledge of the Engagement Agreements in their depositions, making Keough's testimony all the more relevant and important on those Agreements. (See, e.g., R.5004 (Baldwin Dep.; Hendricks Dep.)). Similarly, ClearOne's prior counsel, Jefferson Gross, testified that the "related proceedings" defined in the ETA included the Criminal Case, an issue parallel to finding the meaning of the Engagement Agreements. (*Id.* (Gross Dep. at 33-38, 43-45)). The interrelated nature of all of the claims and discovery done on behalf of those claims cannot be disputed, and the district court consequently did not abuse its discretion in its Collection Case fee award.

## ARGUMENT ON CROSS-APPEAL

## IV. THE DISTRICT COURT ERRED IN SETTING LIMITATIONS ON THE FEES TO WHICH DORSEY WAS CONTRACTUALLY ENTITLED.

Overall, as described above, the district court's analysis and rulings in this case were well-reasoned and well-supported by both the facts and legal authority at issue. Dorsey brings its cross-appeal only because, after holding that the scope of the Engagement Agreements contractually obligated ClearOne to pay Strohm's fees and costs, the district court made three errors in interpreting the terms of the Engagement Agreements that cannot be harmonized with that holding, and therefore require reversal.

In granting summary judgment on Dorsey and Strohm's claims under the Engagement Agreements, the court ruled that:

> [T]he two letters of January 29, 2003 and March 31, 2004, together form an enforceable contract, providing an alternative basis to require defendant ClearOne Communications to pay Susie Strohm's reasonable legal fees incurred in her defense of the federal criminal proceedings. . . .

(R.2967-68). In its order on Dorsey and Strohm's fee petition, however, the court ruled that "from the date of [the] jury verdict [forward,] ClearOne shall not be held liable, at this time, to pay Strohm's fees and expenses in the criminal case post-February 27, 2009, all of which must be attributed to the perjury count." (R.5154). The district court also "expressly impose[d] August 10, 2010," as the last date for which Plaintiffs could seek to recover fees and costs in the Collection Case. (R.5176). In that same January 24, 2011 order, the district court stated that the 18 percent prejudgment interest provided for under Strohm's contractual agreements with ClearOne could be charged for those fees awarded

in the Criminal Case, but could not be charged for those fees awarded in the Collection Case. (R.5178).

Dorsey and Strohm now appeal the time limitations set in reimbursement of both the Criminal Case and Collection Case, and the district court's refusal to allow interest on those fees awarded in the Collection Case. These three issues, as will be further detailed below, involve the district court's interpretation of specific terms of the Engagement Agreements, which had already been found to invoke ClearOne's contractual obligation to pay attorneys' fees and costs. Once attorneys' fees are found to be contractually provided, those fees must be awarded "only in accordance with the terms of the contract." *Softsolutions, Inc.*, 2000 UT 46, ¶ 41; *see also Chase v. Scott*, 2001 UT App 404, ¶¶ 13-17, 38 P.3d 1001, 1004-06 (2002) (stating that courts interpreting contractual terms providing for attorneys' fees must give effect to the terms of the contract). ClearOne has never argued, nor has the district court ever found, that the actual payment terms under the Engagement Agreements are ambiguous, only the applicable scope of those Agreements. Thus, once the district court had determined that the Agreements provided for fees, it was bound by the terms of the contract in interpreting to what extent those fees were due, an interpretation this Court reviews for correctness. *See Meadowbrook, LLC v. Flower,* 959 P.2d 115, 116 (Utah 1998) ("We review a trial court's conclusions of law [regarding attorney fees] for correctness, granting no deference to the trial judge's legal determinations."); *see also Nova Cas. Co. v. Able Const., Inc.*, 1999 UT 69, ¶ 6, 983 P.

2d 575, 577-78 (finding that interpretation of the terms of a contract is a question of law and is reviewed for correctness).

### A. The District Court Erred in Limiting the Reimbursement of Dorsey's Fees in the Criminal Case until only February 27, 2009.

The applicable provisions of the 2003 Engagement Agreement provide that Marsden was engaged "to represent Susie Strohm's interests in connection with the SEC civil complaint . . . and in connection with further related investigations and litigation." (R.0042-43). The 2004 Engagement Agreement updated the earlier one, again providing that Dorsey was engaged "to represent Susie Strohm in connection with the SEC civil complaint, referenced above, and in connection with further related investigations and litigation." (R.0047-48).

Once the district court determined that Dorsey was entitled to fees under the Engagement Letters, it could not change the contract terms to then limit those fees by time or based on the success of that representation. After the district court correctly found that the Engagement Agreements created an enforceable contract that required ClearOne to reimburse Dorsey for its fees, it then decided, without reference to any term of the Agreements, that February 27, 2009—the date of the jury verdict—would be the last date for which Dorsey and Strohm could recover fees. This was an abuse of discretion. Nothing in the plain language of the Agreements refers to a limitation for reimbursement on only those claims on which Strohm was successful. Dorsey's representation of Strohm in her Criminal Case extended until November 8, 2011, when the Tenth Circuit Court of Appeals affirmed the perjury conviction and Strohm elected

not to seek further review. Accordingly, all such fees must be reimbursed under the Engagement Letters.[17]

### B. The District Court Erred by Arbitrarily Limiting the Fee Award for Those Fees Incurred in the Collection Action.

As stated above, once a contract is found to provide for attorneys' fees, Utah courts must award attorneys' fees according to the terms of that contract. *See Softsolutions, Inc.*, 2000 UT 46, ¶ 41; *Chase*, 2001 UT App 404, ¶¶ 13-17. This includes in a collection action, when the contract so provides, and Utah courts have held that such collection fees can extend up through even an appeal similar to this, as long as such fees are requested by the party. See *Chase*, 2001 UT App 404, ¶ 17 n.5.

The Engagement Agreements provide that Dorsey would be entitled to recover "all reasonable costs expended in connection with collecting amounts due under this Agreement, including reasonable attorneys' fees." (R.0043). The district court, however, imposed the arbitrary date of August 10, 2010, as the end date for collecting fees in the Collection Case because it was the date of the last services billed before argument on the motions decided by its January 24, 2011 Order. (R.5176). The district court did so

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[17] Significant work was done after the jury verdict on February 27, 2009, not only on the Tenth Circuit appeal, but also in post-trial motions and Strohm's highly-contested sentencing, all of which occurred before the federal district court. The importance of this work is highlighted by the fact that the government sought 60 months incarceration for Strohm based on her perjury conviction, but, through Dorsey's work in the sentencing phase, Strohm was only sentenced to probation and community service. (R.3166-67).

because "the ever accruing charges must stop at some point," having also expressed that it was troubled by the "overall costs of this litigation." (R.5175-76).

Once the district court determined that Dorsey was entitled to fees under the Engagement Letters, it could not set an arbitrary time limitation on the contract terms. Such a limitation was not within the district court's purview once it had concluded that the Engagement Agreements compelled ClearOne to pay Dorsey's fees incurred in the Collection Action. The district court can properly limit the fees—as it did in this case—but it must do so according to specific, generally factual, factors, e.g., the reasonable of the rates and the necessity of work. *See, e.g.*, *Dixie State Bank v. Bracken*, 764 P.2d 985 (Utah 1988), The district court did not rely on such factors in setting this arbitrary date limitation, and cannot be allowed to so insert itself into the parties' contract. To hold otherwise would encourage ClearOne in this case, and other non-prevailing parties in future cases, to drag out litigation and appeals to burden the prevailing party, forcing undeserved settlements and keeping those parties from payments to which they have been ruled to be entitled. Dorsey therefore requests all reasonable fees it has occurred in the Collection Case, up until and through the current appeal.

### C. The District Court Erred by Failing to Apply the Contractual Interest Term to the Collection Action From the Start of that Action.

Finally, the Engagement Agreements provide that any amount due to Dorsey, which remains unpaid thirty days after it is billed, will "accrue interest at the rate of 18% per annum from the date billed until paid." (R.42). The district court correctly held that this provision was enforceable and applied it to the fees awarded in the Criminal Case.

Although earlier the district court had held that "Plaintiffs are also entitled to judgment for interest and fees incurred in seeking to recover under the [engagement] agreements." (R.2968), the district court arbitrarily refused to apply the interest provision to the fees incurred in the Collection Case, however, and thus abused its discretion. (R.5180).

When prejudgment interest is provided for under a contract, that interest should be calculated for all money owed on that contract, from the date it becomes due until the date it is paid or an offer of judgment is made. *See, e.g.*, *State Drywall v. Rhodes Design & Dev.*, 127 P.3d 1082, 1086 (Nev. 2006). If that is not the rule, non-prevailing parties to such a contract again are incentivized to delay litigation and their payment on collection case fee awards, as the value of that payment continues to decrease with the further passage of time (as has happened throughout the litigation here). *See id.*

In this case the district court's refusal to award interest in the Collection Case at the agreed-upon rate of 18 percent cannot be squared with its other holdings under the Agreements. The district court properly recognized that the Engagement Agreements obligated ClearOne to pay attorneys' fees incurred in seeking unpaid fees. (R.2968). It held that Dorsey and Strohm were entitled to interest on fees in the Collection Case. (R.2968). And it held that the 18 percent interest provision applied to amounts owed but unpaid under the Engagement Agreements, and was fully enforceable. (R.2966).[18] Eighteen percent was the only interest rate upon which the parties had agreed. Once the

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18 As stated, under Utah law, "parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is the subject of their contract." Utah Code Ann. § 15-1-1(1).

district court determined that Dorsey and Strohm were entitled to interest under the Engagement Agreements, it could not change the contract terms to then limit that interest to only the Criminal Case. The district court abused its discretion by arbitrarily declining to award the agreed-upon interest for fees incurred in the Collection Case.

## V. CONCLUSION

For all of the foregoing reasons, Dorsey and Strohm respectfully requests that this Court affirm the judgment of the district court in all respects, except for its rulings limiting (1) reimbursement in the Criminal Case until only February 27, 2009; (2) reimbursement in the Collection Case until only August 10, 2010; and (3) collection of the contractual 18 percent interest to the Criminal Case fee award. With respect to those limited issues only, Dorsey and Strohm requests that the Court reverse the district court's findings and remand the case to the district court for recalculation of a fee award in accordance with the parties' governing Agreements.

RESPECTFULLY SUBMITTED this 13th day of January, 2012.

DORSEY & WHITNEY, LLP

Milo Steven Marsden
Cameron M. Hancock
William Michael Jr.
*Attorneys for Plaintiffs and Appellees Susie Strohm and Dorsey & Whitney LLP*

## CERTIFICATE OF COMPLIANCE

Appellees and Cross-Appellants, by their undersigned counsel, hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 16,462 words, as ascertained using the word count feature of Microsoft® Office Word 2003 software used to prepare the brief, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B); and
2. This brief complies with the type-face requirements of Utah R. App. P. 27(b) because this brief has been prepared in Microsoft® Office Word 2003 (11.8026.8036) SP2 word-processing software in 13-point font size and Times New Roman typeface.

Dated: January 13, 2012

DORSEY & WHITNEY, LLP

Milo Steven Marsden

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that **two** true and correct copies of the foregoing **BRIEF OF APPELLEE AND CROSS-APPELLANT** was served via U.S. First Class Mail, postage prepaid, and electronic mail on the 13 day of January, 2012, to the following:

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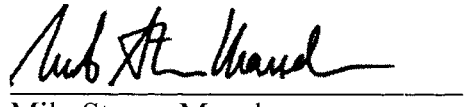

Milo Steven Marsden

# Addendum of Appellee and Cross-Appellant



[1] On November 29, 2011, Appellees and Cross-Appellants filed an unopposed motion to supplement the record, which was granted on December 12, 2012. Addendum C and Addendum D are the two exhibits with which the record is now supplemented, pursuant to this Court's December 12, 2012 order.

# ADDENDUM A

West's Utah Code Annotated Currentness
Title 16. Corporations
Chapter 10A. Utah Revised Business Corporation Act
Part 9. Indemnification
**→→ § 16-10a-902. Authority to indemnify directors**

(1) Except as provided in Subsection (4), a corporation may indemnify an individual made a party to a proceeding because he is or was a director, against liability incurred in the proceeding if:

(a) his conduct was in good faith; and

(b) he reasonably believed that his conduct was in, or not opposed to, the corporation's best interests; and

(c) in the case of any criminal proceeding, he had no reasonable cause to believe his conduct was unlawful.

(2) A director's conduct with respect to any employee benefit plan for a purpose he reasonably believed to be in or not opposed to the interests of the participants in and beneficiaries of the plan is conduct that satisfies the requirement of Subsection (1)(b).

(3) The termination of a proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent is not, of itself, determinative that the director did not meet the standard of conduct described in this section.

(4) A corporation may not indemnify a director under this section:

(a) in connection with a proceeding by or in the right of the corporation in which the director was adjudged liable to the corporation; or

(b) in connection with any other proceeding charging that the director derived an improper personal benefit, whether or not involving action in his official capacity, in which proceeding he was adjudged liable on the basis that he derived an improper personal benefit.

(5) Indemnification permitted under this section in connection with a proceeding by or in the right of the corporation is limited to reasonable expenses incurred in connection with the proceeding.

CREDIT(S)

CROSS REFERENCES

Agricultural cooperative associations, equivalent powers and rights, see § 3-1-13.4.

LIBRARY REFERENCES

Corporations 308(1).
Westlaw Topic No. 101.
C.J.S. Corporations §§ 577 to 579, 625 to 626, 628, 632.

U.C.A. 1953 § 16-10a-902, UT ST § 16-10a-902

Current through 2011 Third Special Session.



END OF DOCUMENT

C

West's Utah Code Annotated Currentness
Title 16. Corporations
Chapter 10A. Utah Revised Business Corporation Act
Part 9. Indemnification
**➡➡ § 16-10a-903. Mandatory indemnification of directors**

Unless limited by its articles of incorporation, a corporation shall indemnify a director who was successful, on the merits or otherwise, in the defense of any proceeding, or in the defense of any claim, issue, or matter in the proceeding, to which he was a party because he is or was a director of the corporation, against reasonable expenses incurred by him in connection with the proceeding or claim with respect to which he has been successful.

CREDIT(S)

CROSS REFERENCES

Agricultural cooperative associations, equivalent powers and rights, see § 3-1-13.4.

LIBRARY REFERENCES

Corporations 308(1).
Westlaw Topic No. 101.
C.J.S. Corporations §§ 577 to 579, 625 to 626, 628, 632.

U.C.A. 1953 § 16-10a-903, UT ST § 16-10a-903

Current through 2011 Third Special Session.



END OF DOCUMENT

C

West's Utah Code Annotated Currentness
Title 16. Corporations
Chapter 10A. Utah Revised Business Corporation Act
Part 9. Indemnification
**➡➡ § 16-10a-905. Court-ordered indemnification of directors**

Unless a corporation's articles of incorporation provide otherwise, a director of the corporation who is or was a party to a proceeding may apply for indemnification to the court conducting the proceeding or to another court of competent jurisdiction. On receipt of an application, the court, after giving any notice the court considers necessary, may order indemnification in the following manner:

(1) if the court determines that the director is entitled to mandatory indemnification under Section 16-10a-903, the court shall order indemnification, in which case the court shall also order the corporation to pay the director's reasonable expenses incurred to obtain court-ordered indemnification; and

(2) if the court determines that the director is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, whether or not the director met the applicable standard of conduct set forth in Section 16-10a-902 or was adjudged liable as described in Subsection 16-10a-902(4), the court may order indemnification as the court determines to be proper, except that the indemnification with respect to any proceeding in which liability has been adjudged in the circumstances described in Subsection 16-10a-902(4) is limited to reasonable expenses incurred.

CREDIT(S)

CROSS REFERENCES

Agricultural cooperative associations, equivalent powers and rights, see § 3-1-13.4.

LIBRARY REFERENCES

Corporations 308(1).
Westlaw Topic No. 101.
C.J.S. Corporations §§ 577 to 579, 625 to 626, 628, 632.

U.C.A. 1953 § 16-10a-905, UT ST § 16-10a-905

Current through 2011 Third Special Session.



END OF DOCUMENT

C

West's Utah Code Annotated Currentness
Title 16. Corporations
Chapter 10A. Utah Revised Business Corporation Act
Part 9. Indemnification
**➡➡ § 16-10a-907. Indemnification of officers, employees, fiduciaries, and agents**

Unless a corporation's articles of incorporation provide otherwise:

(1) an officer of the corporation is entitled to mandatory indemnification under Section 16-10a-903, and is entitled to apply for court-ordered indemnification under Section 16-10a-905, in each case to the same extent as a director;

(2) the corporation may indemnify and advance expenses to an officer, employee, fiduciary, or agent of the corporation to the same extent as to a director; and

(3) a corporation may also indemnify and advance expenses to an officer, employee, fiduciary, or agent who is not a director to a greater extent, if not inconsistent with public policy, and if provided for by its articles of incorporation, bylaws, general or specific action of its board of directors, or contract.

CREDIT(S)

CROSS REFERENCES

Agricultural cooperative associations, equivalent powers and rights, see § 3-1-13.4.

LIBRARY REFERENCES

Corporations 308(1).
Westlaw Topic No. 101.
C.J.S. Corporations §§ 577 to 579, 625 to 626, 628, 632.

U.C.A. 1953 § 16-10a-907, UT ST § 16-10a-907

Current through 2011 Third Special Session.



END OF DOCUMENT

# ADDENDUM B

**History:** 9155, PRO, 01/01/88; 10378, NSC, 12/18/89; 15193, 5YR, 12/15/93; 21658, 5YR, 11/10/98; 26761, 5YR, 10/29/2003; 31993, 5YR, 10/02/2008; 32518, NSC, 05/14/2009.

## Official Commentary To
## Utah Revised Business Corporation Act

## PREPARED BY THE UTAH BUSINESS ACT REVISION COMMITTEE OF THE BUSINESS LAW SECTION OF THE UTAH STATE BAR

*Introductory Note*

The Utah Revised Business Corporation Act adopted in 1992 (the "Revised Act") replaces the Utah Business Corporation Act originally enacted in 1961 (the "Prior Act"). The drafting of the Revised Act for initial presentation to the Utah legislature was accomplished through the efforts of the Utah Business Corporation Act Revision Committee (the "Committee") established through the Business Law Section of the Utah State Bar, in cooperation with Representative Nancy Lyon and the Legislative Research and General Counsel's Office. The Revised Act follows generally the 1984 Revised Business Corporation Act, as subsequently modified (the "Model Act"), adopted by the Committee on Corporate Laws of the Business Law Section of the American Bar Association. In preparing the Revised Act, the Committee modified various Model Act provisions to address concerns and issues raised by Committee members, to retain certain Prior Act provisions considered to be appropriate, to incorporate statutory provisions that have been proposed in Colorado and adopted in other states, and to respond to comments received by interested Utah companies and individuals.

The Model Act is accompanied by Official Comments that were considered, approved and adopted by the Committee on Corporate Laws. We believe that such a commentary can be helpful to business persons and legal practitioners trying to understand, interpret and comply with the provisions of the Revised Act, and the availability of such a commentary was a motivating factor in enacting a corporations code based on the Model Act. Accordingly, the commentary to the Model Act has been reproduced, revised and adapted for use with the Revised Act. This action has been taken with the consent of Prentice Hall Law & Business, the publisher of the Model Act and related Official Comments. Since the following commentary has been revised from the form of Official Comments published with the Model Act, in order to address matters of interest to Utah practitioners and to reflect significant changes made from the Model Act and the Prior Act, this Committee takes full responsibility for the form and content of the commentary. Neither the ABA Committee on Corporate Law, nor the publisher of the Model Act and the associated Official Commentary has reviewed or approved the following commentary.

This commentary is intended to provide an explanation of the meaning, purpose, application and historical development of referenced sections of the Revised Act. It also describes some of the substantive decisions made in the drafting of the Revised Act and highlights certain differences between the Model Act, the Revised Act and the Prior Act. The Utah legislature has endorsed the use of this commentary as an aid in understanding and interpreting the Revised Act, and directed that it be published as a companion to the Revised Act.

The numbers set forth below correspond to the sections of the Revised Act to which the comments relate.

As the Revised Act was put into bill form by the Legislative Research and General Counsel's office, a number of minor modifications were made so that the statutory language would be more consistent with the statutory format and organizational and grammatical constructions preferred by that office. These changes were not intended to modify the substantive meaning of the

affected provisions of the Revised Act. Accordingly, a person comparing the language of the Revised Act to the language of the Model Act should not assume that any minor wording or grammatical differences were intended to modify the meaning of the statute. The types of changes made by the Legislative Research and General Counsel's office include the elimination of subheadings, the removal of parenthesis, deletion of uses of the word "such," and changing of references to the words "shall," "may" and "will". Many of the language changes that were intended to affect the statutory meaning are identified in the following commentary.

## Part 1
## GENERAL PROVISIONS

A Short Title, Definitions and Powers of Division
B Filing Documents

The sections of Part 1 have been rearranged from the order in which they appear in the Model Act. We have also omitted a provision intended to give the legislature the power to amend or repeal all or part of the Revised Act. That provision was determined to be unnecessary, as the Utah Constitution includes a provision mandating the reservation of power to amend or modify corporate statutes (Utah Const. Art. XII, Section 1). For this reason, similar statutory language found in earlier versions of the Model Act was left out of the Prior Act. We understand there is currently an effort in progress to update and simplify the provisions of the Utah Constitution relating to corporations. If the above-referenced language is deleted from the Utah Constitution, appropriate language should be added to the Revised Act to clarify the legislature's ability to amend or modify the Revised Act from time to time.

### Subpart A.
### Short Title, Definitions and Powers of Division

§ 101. Short Title
§ 102. Definitions
§ 103. Notice
§ 104. Powers of Division
§ 120. Filing Requirements
§ 121. Forms
§ 122. Fees for Filing and Related Services
§ 123. Effective Time and Date of Filed Documents
§ 124. Correcting Filed Document
§ 125. Filing Duty of Division
§ 126. Appeal from Division's Refusal to File a Document
§ 127. Evidentiary Effect of Copy of Filed Document
§ 128. Certificates Issued by Division
§ 129. Penalty for Signing False Documents

The index and headings of the Model Act are divided into Chapters and Subchapters. For

review administrative actions.

### § 902. Authority to Indemnify Directors

a. *Section 902(1).*

The standards for indemnification of directors contained in this part define the outer limits for which voluntary indemnification is permitted under the Revised Act. Conduct which does not meet these standards is not eligible for voluntary indemnification under the Revised Act, although court-ordered indemnification may be available under section 905(2). Conduct that falls within these outer limits does not automatically entitle directors to indemnification, although many corporations have adopted or may adopt bylaw provisions that obligate the corporation to indemnify directors to the maximum extent permitted by statute. Absent such a bylaw provision, section 903 defines a much narrower area in which the directors are entitled as a matter of right to indemnification.

Some state statutes provide separate, but usually similarly worded, standards for indemnification in third-party suits and indemnification in suits brought by or in the name of the corporation. The Revised Act establishes a single uniform test to make clear that the outer limits of conduct for which indemnification is permitted should not be dependent on the type of proceeding in which the claim arises. To prevent circularity in recovery, however, section 902(5) limits indemnification in connection with suits brought by or in the name of the corporation to expenses incurred and excludes amounts paid to settle or satisfy substantive claims.

The standards of conduct described in sections 902(1) -- that a director's conduct in his or her official capacity be in "good faith" and in or not opposed to the corporation's "best interests" -- are closely related to the basic standards of conduct imposed by section 840, but the two sets of standards are not identical. No attempt is made to define "good faith," a term used in both section 840 and section 902. The concept of good faith involves a subjective test, which would include "a mistake of judgment," in the words of the commentary to section 840, even though made unwisely by objective standards. But the affirmative requirement of section 840 -- that the care of "an ordinarily prudent person in a like position" be exercised -- is not included in the standard of conduct for indemnification. While section 840 requires that the director have a reasonable belief that his or her conduct is in the best interests of the corporation, section 902 requires that the director have a reasonable belief that the conduct is "in or not opposed to" the best interests of the corporation. Section 902 also requires in the case of any criminal proceedings, that the director have no reasonable cause to believe the conduct was unlawful. Because of the differences in the two sets of standards, it is possible that a director who has not acted "with the care an ordinarily prudent person in a like position would exercise under similar circumstances," as required by section 840, could nevertheless be indemnified if the standard of section 902 were met. As a corollary, it is clear that a director who has met the section 840 standards of conduct would be eligible in virtually every case to be indemnified under section 902.

The Model Act standard for indemnification requires that in the case of conduct in an official capacity, the director must reasonably believe his or her conduct to be in the best interests of the corporation. The Revised Act requires only a reasonable belief that the conduct be "in or not

opposed to" such interests, preserving the general standard applicable under the Prior Act.

b. *Section 902(2).*

This section makes clear that a director who is serving as a trustee or fiduciary for an employee benefit plan under ERISA meets the standard for indemnification under section 902(1) if the director reasonably believes the conduct was in or not opposed to the best interests of the participants in and beneficiaries of the plan. This standard is a specific application of the more general test that conduct not in official corporate capacity is indemnifiable if it is "at least not opposed to" the best interests of the corporation.

c. *Section 902(3).*

The purpose of section 902(3) is to reject the argument that indemnification is automatically improper whenever a proceeding has been terminated on a basis that does not exonerate the director claiming indemnification. Even though a final judgment or conviction is not automatically determinative of the issue whether the minimum standard of conduct was met, any judicial determination of substantive liability would in most instances be entitled to considerable weight. By the same token, it is clear that the termination of a proceeding by settlement or plea of nolo contendere should not of itself create a presumption either that conduct met or did not meet the standard of section 902. On the other hand, a final determination of nonliability or acquittal automatically entitles the director to indemnification of expenses under section 903.

Section 902(3) applies to indemnification expenses in derivative actions as well as to indemnification in third party suits. The most likely application of this subsection to derivative actions will be to settlements since a judgment or order would normally result in liability to the corporation and thereby preclude all indemnification under section 902(4). In the rare event that a judgment or order entered against the director did not include a determination of liability to the corporation, the entry of the judgment or order would not be determinative that the director failed to meet the requisite standard of conduct.

d. *Section 902(4).*

This subsection makes clear that indemnification is not permissible under section 902 in the face of a finding of improper conduct either because liability is imposed in favor of the corporation in a suit brought by or in its name or because there is a finding that the director improperly received a personal benefit as a result of his conduct. Indemnification under this subsection is prohibited if a director is adjudged liable in a derivative suit because it is believed that there should be no indemnification in this situation unless a court first finds it proper. Section 905 permits a director found liable to the corporation to petition a court for a judicial determination of entitlement to indemnification. Voluntary indemnification is also prohibited if there has been an adjudication that a director improperly received a personal benefit, even if, for example, the director acted in a manner not opposed to the best interests of the corporation. Improper use of inside information for personal benefit should not be an action for which the corporation may provide indemnification, even if the corporation was not thereby harmed. Although it is unlikely that a person found liable for receiving an improper personal benefit would be found to have met the statutory standard of conduct set forth in section 902(1)(b) this limitation is made explicit in section 902(4)(b). Recourse to a court under section 905 may also

be appropriate in some improper benefit cases for example, where it would be unfair for a small personal benefit to foreclose indemnification in an expensive and complicated matter.

e. *Section 902(5).*

This subsection limits indemnification in suits brought by or in the right of the corporation to reasonable expenses incurred in connection with the proceeding. Its purpose is to avoid circularity that would be involved if a corporation seeks to indemnify a director for payments made in settlement by the director to the corporation. This subsection applies only to settlements (or the rare event that a judgment or order entered against a director does not include a determination of liability) since all indemnification is prohibited by section 902(4)(a) -- subject to the right to seek judicially approved indemnification under section 905 -- in cases where a director is "adjudged" liable to the corporation.

### § 903. Mandatory Indemnification

Section 902 determines whether indemnification may be made voluntarily by a corporation if it elects to do so. Section 903 determines whether a corporation must indemnify a director for his or her expenses; in other words, section 903 creates a statutory right of indemnification in favor of the director who meets the requirements of that section. Enforcement of this right by judicial proceeding is specifically contemplated by section 905, which also gives the director a statutory right to recover expenses incurred in enforcing the statutory right to indemnification under section 903.

The basic standard for mandatory indemnification is that the director has been "successful, on the merits or otherwise, in the defense of any proceeding, or in the defense of any claim, issue, or matter in the proceeding. . . ." This provision has been modified from the Model Act language to preserve a director's right to indemnification, as was available under the Prior Act, against expenses and fees incurred in connection with the successful defense of any claim, issue or matter in any proceeding to which the director was a party by reason of being a director of the corporation. The Model Act language provides for mandatory indemnification only if the director is "wholly" successful in the defense of an entire proceeding. Thus the Model Act would not entitle a director to partial mandatory indemnification if the director succeeded to obtain a dismissal of some but not all counts of an indictment. Under the Model Act language, a defendant would be "wholly successful" only if the entire proceeding were disposed of on a basis involving a finding of nonliability. Both the Model Act and the Revised Act retain the language of earlier versions of the Model Act and of many other state statutes (including the Prior Act) that the basis of success may be "on the merits or otherwise." While this standard may result in defendants becoming entitled to indemnification because of procedural defenses not related to the merits -- e.g., the statute of limitations or disqualification of the plaintiff, it is unreasonable to require a defendant with a valid procedural defense to undergo a possibly prolonged and expensive trial on the merits in order to establish eligibility for mandatory indemnification.

### § 904. Advance of Expenses for Directors

It is often critically important to a director who is made a party to a complex proceeding that

the corporation have power to make advances for expenses at the beginning of and during the proceeding. Adequate legal representation and adequate preparation of a defense may require substantial payments of expenses before a final determination, and unless the corporation may make advances for expenses, a defendant may be unable to finance the defense. This problem is complicated by reason or the fact that during the early stages of a proceeding (when advances are often needed) the facts underlying the claim cannot be fully evaluated and the board of directors therefore cannot accurately ascertain the ultimate propriety of indemnification.

Section 904 establishes a workable standard: indemnification is permitted if the facts then known to those making the determination do not establish that indemnification would be precluded under section 902. The directors (or special legal counsel) making the determination under section 904(3) would normally communicate with counsel and the person or persons monitoring the matter for the corporation in order to gain familiarity with the status of the proceeding and the relevant facts that have emerged, but it is not required (or expected) that any form of independent investigation be undertaken for purposes of the determination. Thus, an advance may be made under section 904 unless it becomes clear, from the facts at hand, that indemnification under section 902 cannot be provided. As additional facts become known, a different determination may be required.

This section is a compromise between the view of some that advances should be made automatically at the claimant's request and at any time before the litigation is terminated and the view of others that a special investigation should be made before each advance.

In addition to the requirement that the facts then known to those acting on the request for an advance do not preclude indemnification, section 904(1) requires a written affirmation of the director's good faith belief that the director has met the standard of conduct necessary for indemnification by the corporation and a written undertaking by or on behalf of the director to repay the advance if it is ultimately determined that the director has not met the standard of conduct. Under section 904(2), the undertaking need not be secured and financial ability to repay is not a prerequisite. The theory underlying this subsection is that, in advancing expenses, wealthy directors should not be favored over directors whose financial resources are modest.

The limitations of section 904 apply only to persons who are directors at the time the advance is made. Thus the corporation may advance the expenses of former directors without obtaining the undertaking otherwise required by section 904(1)(a) or (b).

### § 905. Court-Ordered Indemnification of Directors

Section 905 permits court-ordered indemnification in two situations: (1) a director entitled to mandatory indemnification may enforce that entitlement by judicial proceeding; and (2) a director who claims to be fairly and reasonably entitled to indemnification in view of all the circumstances may request the court to order appropriate indemnification. In either case, the court must satisfy itself that the person seeking indemnification is properly entitled to it.

A corporation may limit the right of a director under section 905 by a provision in its articles of incorporation. In the absence of such a provision, however, the court has general power to grant indemnification under this section.

## § 906. Determination and Authorization of Indemnification of Directors

Section 906 provides the method for determining whether a corporation should voluntarily indemnify directors under section 902. In this section a distinction is made between a "determination" and an "authorization." A "determination" involves a decision whether under the circumstances of the particular case the person seeking indemnification has met the requisite standard of conduct under section 902 and is therefore eligible for indemnification. This decision may be made by the persons or groups described in section 906(2). In addition to a favorable "determination," the corporation must "authorize" indemnification and advance of expenses. The authorization would be based on a review and evaluation of the reasonableness of expenses, the financial ability of the corporation to make the payment, and the judgment whether limited financial resources should be devoted to this or some other use by the corporation. Of course, if the bylaws require indemnification to the extent permitted by statute, authorization will already exist. Except in this case, section 906(4) provides that "authorization" of indemnification may be made only by the board of directors, by a committee of the board, or by the shareholders. While special legal counsel may make the "determination" of eligibility for indemnification, such counsel may not "authorize" the indemnification.

Section 906(2) establishes a procedure for selecting the person or persons who will make the determination of eligibility for indemnification. Even though directors who are parties to the proceeding may not participate in the decision determining eligibility for indemnification, they may, if necessary to permit valid action by the board of directors, participate in the decision establishing a committee of independent directors or selecting special legal counsel. Directors who are parties may also participate in the decision to "authorize" indemnification on the basis of a favorable "determination" if necessary to permit action by the board of directors. This limited participation of interested directors in the decision is justified by a principle of necessity.

Legal counsel authorized to make the required determination is referred to as "special legal counsel." In earlier versions of the Model Act, and in the statutes of many states, such counsel is referred to as "independent" legal counsel. The word "special" is felt to be more descriptive of the role to be performed and is not intended to indicate that the counsel selected should not be independent in accordance with governing legal precepts. "Special legal counsel" should normally be counsel having no prior professional relationship with those seeking indemnification, should be retained for the specific occasion, and should not be either inside counsel or regular outside counsel. It is important that the selection process be sufficiently flexible to permit selection of counsel in light of the particular circumstances and so that unnecessary expense may be avoided. Hence the phrase "special legal counsel" is not defined in the statute.

Determinations by shareholders rather than by directors or special counsel are permitted by section 906(2)(d), but shares owned by or voted under the control of directors seeking indemnification may not be voted on the determination of eligibility for indemnification. This does not affect rules governing the determination of a quorum at the meeting.

## § 907. Indemnification of Officers, Employees, Fiduciaries and Agents

Section 907 correlates the general legal principles relating to the indemnification of officers, employees, fiduciaries and agents of the corporation with the limitations on indemnification in part 9. This correlation may be summarized in general terms as follows:

(1) Part 9 (except for section 907 and to the extent 907 grants indemnification rights to officers, agents, fiduciaries and employees, consistent with the rights granted to directors in sections 903 and 905) applies only to, and limits the indemnification of, directors.

(2) An officer, agent, fiduciary or employee of a corporation who is not a director may be indemnified by the corporation on a discretionary basis to the same extent as though such person were a director, and, in addition, may have additional indemnification rights apart from part 9. (Section 907(2) and (3).)

(3) A director who is also an officer, employee, fiduciary or agent of the corporation is limited to indemnification rights under part 9 and is therefore treated the same way as other directors. (Section 907(3) by negative inference.) Such an officer/director is limited to the rights arising under part 9 even though such person is sued solely in the capacity as an officer.

(4) An officer of the corporation (but not employees, fiduciaries or agents generally) who is not a director has the mandatory right of indemnification granted to directors under section 903 and the right to apply for court-ordered indemnification under section 905.

a. *Officers, Employees, Fiduciaries or Agents Who Are Not Directors.*

Section 907(3) authorizes indemnification for officers, employees, fiduciaries and agents who are not directors, but neither requires nor prescribes standards for their indemnification and expressly states that their indemnification may be broader than the right of indemnification granted to directors by this part. The rights of employees, fiduciaries or agents may derive from principles of agency, the doctrine of respondeat superior, or collective bargaining or other contractual agreement, rather than from the statute. Indemnification of employees, fiduciaries or agents may appropriately protect the person indemnified from liabilities incurred while serving at the corporation's request as a director, officer, partner, trustee, or agent of another commercial, charitable, or nonprofit enterprise. See the definition of "director" in section 901. But indemnification under section 907(3) must ultimately be "consistent with law." In effect, this leaves public policy determinations as to what are permissible limits, in a particular case, to the courts. For example, in *Koster v. Warren*, 297 F.2d 418,423 (9th Cir. 1961), the court allowed indemnification of an officer and an employee, both of whom pleaded nolo contendere to an antitrust indictment at the corporation's request, the court reasoning that they had foregone their personal right to defend for the corporation's benefit. On the other hand, the court indicated in dictum that an agreement in advance by the corporation to indemnify anyone convicted of antitrust violations would be against public policy.

The broad grant of indemnification in section 907(3) may be limited by appropriate provisions in the articles of incorporation.

b. *Directors Who Are Also Officers, Employees, Fiduciaries or Agents.*

Section 907 provides that officers, employees, fiduciaries or agents who are also directors are

subject to the same standards of indemnification as other directors. Consideration was given to whether these officer-directors, if acting in their capacity as an officer but not as a director, should have the benefit of the additional flexibility afforded by section 907(3) for officers who are not directors. It was concluded, however, that all directors should be treated alike; complications may be created if directors who are not officers have potentially less protection under the statute than directors who are officers. It would also be difficult in many instances to distinguish in what capacity an officer-director is acting. Finally, this part offers sufficient flexibility in indemnifying directors so that, as a practical matter, foreseeable problems for officer-directors can be handled within the statutory framework.

c. *Officers Who Are Not Directors.*

Section 907(l) grants nondirector officers the same mandatory rights to indemnification under section 903 (or to petition a court for indemnification under section 905) as are granted directors. Thus, the net effect of section 907 is to provide officers with no less protection than is provided directors (including protection for service to third parties at the request of the corporation) and, additionally, to permit the corporation to provide broader indemnification for officers who are not directors.

**§ 908. Insurance**

Section 908 authorizes a corporation to purchase and maintain insurance on behalf of directors, officers, employees, fiduciaries or agents against liabilities imposed on them by reason of actions in their official capacity or arising from their service to the corporation or another entity at the corporation's request. Insurance is not limited to claims against which corporations are entitled to indemnify under this part. This insurance, usually referred to as "D&O Liability Insurance," provides a useful supplement to the rights of indemnification created by this part providing a source of reimbursement for corporations who indemnify directors and others for conduct covered by the insurance, and protecting the insureds against the corporation's failure to pay indemnification required or permitted by this part. On the other hand, policies do not cover uninsurable events like self-dealing, bad faith, knowing violations of the securities acts, or other willful misconduct. See generally Johnston, "Corporate Indemnification and Liability Insurance," 33 BUS. LAW. 1993 (1978); Hinsey, "The New Lloyd's Policy Form for Directors and Officers' Liability Insurance Analysis," 33 BUS. LAW. 1961 (1978).

**§ 909. Limitations on Indemnification of Directors**

Section 909(1) provides that a provision treating the indemnification of directors by the corporation in articles of incorporation, bylaws, shareholders' or directors' resolution, or contract (other than an insurance policy) "is valid only if and to the extent the provision is not inconsistent with" this part. Earlier versions of the Model Act and the statutes of many states provided that the statutory provisions were not "exclusive" and made no attempt to limit the nonstatutory creation of rights of indemnification. This kind of language Is subject to misconstruction, however, since nonstatutory conceptions of public policy limit the power of a corporation to indemnify or to contract to indemnify directors, officers, employees, or agents.

The language of the first sentence of section 909(1), "to the extent the provision is not inconsistent with this part 9," is believed to be a more accurate description of the limited validity of nonstatutory indemnification provisions than the "nonexclusive" provisions of earlier versions of the Model Act. It is important to recognize that "to the extent the provision is not inconsistent with" is not synonymous with "exclusive." Situations may well develop from time to time in which indemnification is permissible under section 909 but would be precluded if all portions of part 9 were viewed as exclusive. But indemnification provisions protecting against the consequences of bad faith or willful misconduct are not consistent with this part and would not be valid. Furthermore, they would violate well-understood principles of public policy and doubtless would be invalidated on that ground even under statutes purporting to make "nonexclusive" the statutory provisions for indemnification. To the extent the consistency language may preclude indemnification in circumstances where it is reasonable and violates no statutory policy, an escape valve is provided in section 905(2), which authorizes a court to grant indemnification if a director "is fairly and reasonably entitled to indemnification in view of all the relevant circumstances," even though the director may not have fully met the standards of conduct set forth in section 902.

Section 909 does not preclude provisions in articles of incorporation, bylaws, resolutions, or contracts designed to provide procedural machinery different from that provided by section 906 or to make mandatory the permissive provisions of part 9. For example, a corporation may properly obligate the board of directors to consider and act expeditiously on an application for indemnification or advances, or obligate the board of directors to cooperate in the procedural steps required to obtain a judicial determination under section 905.

Some corporations currently commit themselves, in one form or another, to indemnify directors to the fullest extent permitted by applicable law. These commitments are consistent with part 9, subject to appropriate interpretation in light of the facts and circumstances of the particular case. Furthermore, a commitment to maintain liability insurance for a director, pursuant to section 908, is consistent with this part.

The first sentence of section 909(1) applies only to directors; it does not apply to officers, employees, fiduciaries or agents who are not directors. See section 907 and its related commentary. The inherent problems of conflict of interest and the need to encourage persons to serve as directors are not present to the same degree in the case of nondirector officers, employees, fiduciaries or agents. The standard for permissible indemnification of these persons in section 907(3) is "consistent with law" without regard to this subchapter.

Section 909(2) is designed to make clear that part 9 deals only with directors who are actual or prospective defendants or respondents in a proceeding, and that expenses incurred in connection with appearance as a witness may be indemnified without regard to the limitations of part 9. Indeed, most of the standards described in sections 902 and 905 by their own terms can have no meaningful application to a director whose only connection with a proceeding is as a witness.

## Part 10

# ADDENDUM C

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**IN THE THIRD JUDICIAL DISTRICT COURT**
**COUNTY OF SALT LAKE STATE OF UTAH**

| | |
|---|---|
| SUSIE STROHM and DORSEY & WHITNEY LLP,<br><br>Plaintiffs,<br><br>vs.<br><br>CLEARONE COMMUNICATIONS, INC.,<br><br>Defendant. | **PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFF'S THIRD CLAIM FOR RELIEF (ENGAGEMENT AGREEMENTS)**<br><br>Case No. 080917500<br><br>Judge Hilder |

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## TABLE OF AUTHORITIES

Plaintiffs Susie Strohm ("Strohm") and Dorsey & Whitney LLP ("Dorsey") (together, "Plaintiffs"), by and through their undersigned counsel, hereby submit this: (1) memorandum in opposition to Defendant's Cross-Motion for Summary Judgment ("ClearOne's Cross-Motion")[1] filed by defendant ClearOne Communications, Inc. ("ClearOne"), and (2) reply in support of the Plaintiffs' Renewed Motion for Partial Summary Judgment on Plaintiff's Third Claim for Relief (Engagement Agreements) ("Plaintiffs' Renewed Motion").[2] In further support of Plaintiffs' Renewed Motion, the Plaintiffs state as follows:

## INTRODUCTION

This Court ruled that the 2003 Engagement Agreement and 2004 Engagement Agreement (collectively the "Engagement Agreement" or "Engagement Agreements") are ambiguous as to their scope and that extrinsic evidence would be needed to resolve this ambiguity. Based on established rules of contract construction, the central issue this Court must now determine is the intent of the parties by examining extrinsic. The undisputed testimony of ClearOne's corporate 30(b)(6) designee, Michael. Keough, together with contemporaneous documents drafted and entered into by ClearOne conclusively establish the parties intended the scope of the Engagement Agreements to cover potential criminal actions related to the SEC Action, including the Criminal Case. Unable to dispute the conclusive testimony of its corporate representative and its contemporaneous documents, ClearOne argues the Engagement Agreement should be construed against Dorsey and this Court should ignore the testimony of the person who signed

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1 The memorandum filed in support of ClearOne's Cross-Motion is hereinafter referred to as "ClearOne's Memorandum."

2 Any capitalized term not otherwise defined herein shall have the meaning ascribed to it in the memorandum filed in support of Plaintiffs' Renewed Motion ("Plaintiff's Memorandum").

the Engagement Agreements as the CEO of ClearOne. As set forth below, ClearOne's arguments lack factual and legal merit and Plaintiffs' motion for summary judgment should be granted.

In the event this Court grants Plaintiffs' renewed motion for summary judgment, Plaintiffs are prepared to voluntarily dismiss their remaining claims. However, if this Court determines that Plaintiffs' motion for summary judgment should be denied because material issues of fact exist, Plaintiffs' remaining claims will not be moot as suggested by ClearOne. First, this Court should deny ClearOne's cross motion for summary judgment on the second and eighth claims for relief because the Employment Termination Agreement (the "ETA") unambiguously grants Strohm rights to recover attorneys' fees not allowed under her mandatory indemnification claims. Second, ClearOne's unjust enrichment and equitable estoppel claims are not moot until this Court rules that the Engagement Agreements cover the claims for attorneys' fees by Dorsey against ClearOne. In addition, the facts establish ClearOne bestowed a benefit on ClearOne and representations were made that are not included in the written agreements.

## REPLY RECONCILIATION OF THE MATERIAL UNDISPUTED FACTS

Rule 7(c)(3)(B) of the Utah Rules of Civil Procedure required ClearOne's Memorandum to contain a verbatim statement of each of the Plaintiffs' facts that ClearOne contends are controverted and provide an "explanation for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials." Utah R. Civ. P. 7(c)(3)(B). Each fact set forth in the Plaintiffs' Memorandum is deemed admitted for purposes of summary judgment unless controverted in the manner required by Rule 7(c)(3)(B). *See* Utah R. Civ. P. 7(c)(3)(A).

ClearOne did not respond to factual paragraphs 1-3, 5-12, or 18-27 of the Plaintiffs' Memorandum. Therefore, these facts are deemed admitted. Furthermore, ClearOne did not present any "facts" supported by a citation to affidavits or discovery materials that contest the facts in paragraphs 4, 13-17, or 28-38, as required by Rule 7. Rather, ClearOne either presented legal arguments or conclusory statements that do not create an issue of fact. *See* ClearOne's Memo. at Responses to ¶¶ 4, 13-17, and 28-38.[3] Accordingly, these facts are also deemed admitted.

A summary of the undisputed material facts is as follows:

1. At the time ClearOne signed the 2003 Engagement Agreement, it knew that the DOJ Investigation was underway and aimed at ClearOne, Flood and Strohm. ClearOne also understood that the DOJ Investigation could result a criminal indictment and case against Strohm. *See* Fact Reconciliation at ¶¶ 1-4, 28; Tab A - Joint Defense Privilege and Confidentiality Agreement.

2. The scope of the Engagement Agreements covered potential criminal actions related to the SEC Action, and Mr. Marsden and Dorsey were retained to represent Ms. Strohm in any such potential criminal actions including the Criminal Case. *See* Fact Reconciliation at ¶¶ 17-28.

3. Under the Engagement Agreements, ClearOne agreed to pay Dorsey's bills "on receipt," and to pay interest (at 18% per annum) on any invoices that remained unpaid more than 30 days after receipt. Fact Reconciliation at ¶¶ 29-30.

4. The Engagement Agreements entitle Dorsey to the payment of its attorneys' fees incurred in connection with efforts to collect amounts due under the Engagement Agreements. Fact Reconciliation at ¶¶ 30-31.

5. The 2004 Engagement Agreement was merely an amendment to the 2003 Engagement Agreement to reflect the change of law firms by Mr. Marsden, and the terms of the 2003 Engagement Agreement that were not amended remained in effect. Fact Reconciliation at ¶¶ 31-33.

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[3] Attached hereto as Exhibit 1 is a reconciliation of the facts in paragraphs ¶¶ 4, 13-17, and 28-38 of Plaintiffs' Memorandum demonstrating that ClearOne failed to controvert these facts (the "Fact Reconciliation").

## PLAINTIFFS' RESPONSES TO CLEARONE'S STATEMENT OF FACTS

Pursuant to Rule 7(c)(3)(B), the Plaintiffs hereby respond to ClearOne's statement of facts as follows:

**ClearOne's Statement ¶ 1.** Bendinger, Crockett, Peterson & Casey – Steve Marsden's law firm when his representation of Susie Strohm began – was a "litigation boutique" consisting of 15-22 securities and antitrust litigators and "utility infielders [attorneys]." Marsden Dep. 18:11-21.

**Plaintiffs' Response to ¶ 1:** The Plaintiffs do not dispute that the language from Mr. Marsden's deposition is accurately quoted above. Mr. Marsden, however, clearly testificd, he handled criminal matters both before and after he was retained by ClearOne to represent Ms. Strohm in the Criminal Case. *See* Transcript of Deposition of Milo Steven Marsden (the "Marsden Dep.") at 19:1-8; 20:2-3; 20:8-11; 150:22-151:6. Relevant portions of the Marsden Dep. are attached hereto as Exhibit 2. In any event, this fact statement is irrelevant to whether the parties intended the Engagement Agreements to cover the Criminal Case, and does not refute the undisputed testimony of ClearOne's own Rule 30(b)(6) representative, Michael Keough, who testified several times that ClearOne unequivocally intended the scope of the Engagement Agreements to include the Criminal Case. *See* Fact Reconciliation at ¶¶ 28 – 33.

**ClearOne's Statement ¶ 2.** As of January 2003 – when the Bendinger engagement letter was signed – Steve Marsden himself was not handling any white-collar criminal cases and does not know if anyone at Bendinger was handling a white-collar criminal case. Marsden Dep. 19:9-22.

**Plaintiffs' Response to ¶ 2**: Undisputed. *See* Plaintiffs' Response to ¶ 1.

**ClearOne's Statement ¶ 3.** As of January 2003, Steve Marsden had not held himself out as a white-collar criminal law specialist. Marsden Dep. 19:23-20:4.

**Plaintiffs' Response to ¶ 3** : *See* Plaintiffs' Response to ¶ 1.

**ClearOne's Statement ¶ 4.** In contrast, Fran Flood's attorney Max Wheeler "is a highly visible criminal law specialist" and is "known in the community as a criminal lawyer." Marsden Dep. 17:25-18:5.

**Plaintiffs' Response to ¶ 4**: Max Wheeler's status as a criminal lawyer is undisputed. *But see* Plaintiffs' Response to ¶ 1.

**ClearOne's Statement ¶ 5.** ClearOne's co-CEO Michael Keough did not know whether Steve Marsden had any experience handling criminal matters when he signed the Bendinger engagement letter dated January 29, 2003 and the Dorsey engagement letter dated March 31, 2004 and still to this day does not know anything about Mr. Marsden's background. Keough Dep. 141:7-13.

**Plaintiffs' Response to ¶ 5**: *See* Plaintiffs' Response to ¶ 1. The cited deposition testimony does not support ClearOne's contention Keough was a co-CEO. Keough testified he signed the 2003 Engagement Agreement. This testimony, however, does not dispute Mr. Keough's testimony that the scope of the Engagement Agreements included the Criminal Case. *See* Fact Reconciliation at ¶¶ 28-32.

**ClearOne's Statement ¶ 6.** Keough signed the Bendinger Crockett engagement letter dated January 29, 2003. Keough Dep. 108:11-23.

**Plaintiffs' Response to ¶ 6**: Undisputed. ClearOne conveniently omits the fact that Keough signed the 2003 Engagement Agreement as ClearOne's CEO, that he was authorized to sign the 2003 Engagement Agreement, and that he read and reviewed the 2003 Engagement Agreement prior to signing it so he could understand its terms before signing the agreement. *See* Fact Reconciliation at ¶ 30; Plaintiffs' Memorandum Supp., Ex. 5; Transcript of 30(b)(6) Deposition of ClearOne Communications, Inc. (the "ClearOne Dep.") (referred to by ClearOne as Keough Dep.) at 108:9-109:8. Relevant portion of the ClearOne Dep. are attached hereto as Exhibit 3.

**ClearOne's Statement ¶ 7.** Keough does not recall how the Bendinger engagement letter was delivered to him and does not recall what he did with the document after he signed it. Keough Dep. 138:22-24; 142:16-19.

**Plaintiffs' Response to ¶ 7 :** Undisputed. *See* Plaintiffs' Responses to ¶¶ 6-7.

**ClearOne's Statement ¶ 8.** Keough did not discuss the Bendinger engagement letter with Ms. Strohm or Mr. Marsden and was not involved in any negotiations of the terms of the Bendinger engagement letter. Keough Dep. 138:25-139:15.

**Plaintiffs' Response to ¶ 8:** *See* Plaintiffs' Responses to ¶¶ 6-7.

**ClearOne's Statement ¶ 9.** In fact, Keough does not recall discussing the Bendinger engagement letter with anyone at all. Keough Dep. 139:16-18.

**Plaintiffs' Response to ¶ 9:** *See* Plaintiffs' Responses to ¶¶ 6-7.

**ClearOne's Statement ¶ 10.** Moreover, Keough admitted that he did not remember discussing the Bendinger engagement letter with anyone "because in a lot of ways when I was

signing here, it was what had already been decided by the board. So I'm not going to call it a formality, but there was nothing I was going to either really change or have a lot of input on. It was going to be decided by the board." Keough Dep. 142:20-143:6.

**Plaintiffs' Response to ¶ 10**: *See* Plaintiffs' Responses to ¶¶ 6-7. Keough testified that the Board did not discuss limiting the scope of Mr. Marsden's representation to just the SEC Action and also testified his understanding regarding the scope of Mr. Marsden's representations were based discussions that took place with the Board. *See* Fact Reconciliation at ¶ 29; ClearOne Dep. at 89:9-90:13.

**ClearOne's Statement ¶ 11.** Keough has no idea how Steve Marsden was selected to represent Ms. Strohm. Keough Dep. 141:5-6.

**Plaintiffs' Response to ¶ 11**: *See* Plaintiffs' Responses to ¶¶ 6-7, 10.

**ClearOne's Statement ¶ 12.** The only thing that Keough had been told by any Board member or someone from Clyde, Snow – then representing ClearOne in the SEC Action – about Steve Marsden prior to Mr. Keough signing the January 29, 2003 Bendinger engagement letter was that Steve Marsden would be representing Susie Strohm. Keough Dep. 143:7-144:5.

**Plaintiffs' Response to ¶ 12:** *See* Plaintiffs' Responses to ¶¶ 6-7, 10.

**ClearOne's Statement ¶ 13.** Regarding discussions by ClearOne's Board of Directors with respect to the retention of Steve Marsden, Keough remembers only that Mr. Marsden – not a criminal lawyer – would be representing Ms. Strohm and that Max Wheeler – a criminal lawyer – was representing Ms. Flood. Keough Dep. 42:22-43:3.

**Plaintiffs' Response to ¶ 13:** *See* Plaintiffs' Responses to ¶¶ 2, 6-7, 10. ClearOne conveniently omits the fact that seven days after entering into the 2003 Engagement Agreement, ClearOne, Ms. Flood and Ms. Strohm entered into a joint defense agreement related to the defense of the DOJ investigation aimed at ClearOne, Ms. Flood, and Ms. Strohm, and any future criminal proceedings (the "Joint Defense Agreement"). A copy of the Joint Defense Agreement is attached hereto as Exhibit 4. *See* Fact Reconciliation at ¶ 4. The Joint Defense Agreement was signed by ClearOne's counsel, Ms. Flood's counsel Max Wheeler, and Ms. Strohm's counsel Mr. Marsden. *See* Joint Defense Agreement at 7.

**ClearOne's Statement ¶ 14.** Keough recalls discussions by ClearOne's Board of Directors that if there was a criminal proceeding in the future, ClearOne may have different views on indemnification. Keough Dep. 158:1-7.

**Plaintiffs' Response to ¶ 14:** The Plaintiffs dispute this statement to the extent that ClearOne is attempting to imply that ClearOne did not agree in the Engagement Agreements to pay for the attorneys' fees and costs incurred by the Plaintiffs in the Criminal Case and in this

case. ClearOne testified at length regarding this during its deposition. *See, e.g.,* ClearOne Dep., at 33:2-20; 44:20-46:4; 111:10-112:2; 114:2-11; 117:8-118:4; 119:13-120:18; 122:3-10; 170:23-171:10; 175:12-22.

**ClearOne's Statement ¶ 15.** Keough does not remember any discussion by ClearOne's Board of Directors with respect to the scope of Mr. Marsden's retention. Keough Dep. 45:14-19.

**Plaintiffs' Response to ¶ 15:** *See* Plaintiffs' Responses to ¶¶ 6-7, 10 and 14.

**ClearOne's Statement ¶ 16.** Keough does not recall how the Dorsey engagement letter dated March 31, 2004 was delivered to him. Keough Dep. 161:16-21.

**Plaintiffs' Response to ¶16**: *See* Plaintiffs' Responses to ¶¶ 6-7, 10, and 14.

**ClearOne's Statement ¶ 17.** Keough signed the Dorsey engagement letter dated March 31, 2004. Keough Dep. 123:20-25.

**Plaintiffs' Response to ¶ 17:** Undisputed. The Plaintiffs note, however, that Mr. Keough was authorized to sign the 2004 Engagement Agreement on behalf of ClearOne as its CEO. ClearOne Dep. 124:1-3.

**ClearOne's Statement ¶ 18.** It was Keough's understanding the Mr. Marsden sent the Dorsey engagement letter because Mr. Marsden "was continuing to represent Susie [Strohm] but he was with a different firm" and the letter "felt more like just a notification than anything else." Keough Dep. 124:4-14.

**Plaintiffs' Response to ¶ 18**: The Plaintiffs do not dispute that the selective language from ClearOne's deposition is accurately quoted above. Mr. Keough, however, further testificd that ClearOne understood the 2004 Engagement Agreement updated and amended some of the terms of the 2003 Engagement Agreement. *See* Fact Reconciliation at ¶ 38; ClearOne Dep. at 124-27. He further testified that ClearOne understood the 2003 and 2004 Engagement Agreements to constitute one agreement. *See id.*

**ClearOne's Statement ¶ 19.** Keough did not have any discussions with Susie Strohm or Steve Marsden about the Dorsey engagement letter. Keough Dep. 161:22-162:4.

**Plaintiffs' Response to ¶ 19**: *See* Plaintiffs' Responses to ¶¶ 6-7, 10, 14.

**ClearOne's Statement ¶ 20.** Keough does not recall negotiating any of the terms in the Dorsey engagement letter. Keough Dep. 162:5-7.

**Plaintiffs' Response to ¶ 20**: *See* Plaintiffs' Responses to ¶¶ 6-7, 10, 14.

**ClearOne's Statement ¶ 21.** In fact, Keough has no specific recollection of discussing the Dorsey engagement letter with anyone. Keough Dep. 162:13-15.

**Plaintiffs' Response to ¶ 21**: *See* Plaintiffs' Responses to ¶¶ 6-7, 10-14.

**ClearOne's Statement ¶ 22.** By signing the Dorsey engagement letter, Keough did not intend to give Susie Strohm any rights in addition to what she received in her Employment Termination Agreement. Keough Dep. 164:10-15.

**Plaintiffs' Response to ¶ 22**: *See* Plaintiffs' Response to ¶ 14. ClearOne conveniently ignores Keough's testimony that he understood the Employment Termination Agreement ("ETA") obligated ClearOne to pay Strohm's legal fees in the criminal action as billed by Mr. Marsden. *See* ClearOne Dep. at 67:20-72:12; 73:23-74:19; Fact Reconciliation at ¶ 33. Keough's understanding that the ETA itself already obligated ClearOne to pay Strohm's fees in the criminal action is entirely consistent with Keough's understanding that the 2004 Engagement Agreement did not to expand the rights given to Strohm in the ETA.

**ClearOne's Statement ¶ 23.** In June 2004, Michael Keough was involuntarily relieved as ClearOne's CEO by Dal Bagley, ClearOne's Chairman of the Board, because of unspecified allegations from Mr. Keough's former administrative assistant. Keough Dep. 27:11-28:12.

**Plaintiffs' Response to ¶ 23**: Undisputed.

**ClearOne's Statement ¶ 24.** Bendinger's invoices for its representation of Ms. Strohm from January 15, 2003 through January 14, 2004 do not make any reference to a U.S. Department of Justice investigation or a grand jury investigation or to any potential criminal issue, except for the following entries:

01/31/03 [Aaron G. Murphy] **Research re: criminal liability**; research re: causes of action; attend joint defense meeting; conference with S. Marsden re: strategy and issues; call to S. Strohm. 7.70 hrs 150 /hr 1,155.00

04/16/03 [Aaron G. Murphy] **Review letter from R. Snow re: AUSA investigation.** .20 hrs 150 /hr 30.00

Bendinger Invoices (attached hereto as Exhibit C) (emphasis added).

**Plaintiffs' Response to 24**: The Plaintiffs do not dispute the language contained in the Bendinger Crockett invoices is accurately quoted above. These entries demonstrate, among other things, that in January 2003 (when the 2003 Engagement Agreement was executed), Mr. Marsden was performing services related to potential criminal proceedings against Ms. Strohm. ClearOne paid these invoices without complaint thereby demonstrating that ClearOne understood

the scope of Mr. Marsden's engagement to include potential criminal proceedings such as the Criminal Case. *See also* Plaintiffs' Response to ¶ 14.

**ClearOne's Statement ¶ 25.** Steve Marsden first learned about the grand jury investigation in January 2003. Marsden Dep. 66:10-13.

**Plaintiffs' Response to ¶ 25**: Undisputed.

**ClearOne's Statement ¶ 26.** Susie Strohm was not asked to appear before the grand jury and never received a subpoena from the grand jury. Marsden Dep. 73:25-74:3; 169:6-11.

**Plaintiffs' Response to ¶ 26**: Undisputed. It is common, however, for the subject of a grand jury investigation to not be asked to appear before the grand jury.

**ClearOne's Statement ¶ 27.** In connection with the U.S. Department of Justice investigation in 2003, there was very little for Bendinger to do because the U.S. Attorney was not talking to Bendinger or Ms. Strohm, and Mr. Marsden "wasn't going to talk to the U.S. Attorney." Marsden Dep. 74:24-75:11.

**Plaintiffs' Response to ¶ 27**: The Plaintiffs do not dispute that the selective language from Mr. Marsden's deposition is accurately quoted above. *But see* Plaintiffs' Response to ¶ 14.

**ClearOne's Statement ¶ 28.** When Steve Marsden was considering switching firms, he completed a "Dorsey & Whitney LLP Conflicts and Screening Report and Professional Background Information" form (hereinafter "Dorsey Conflicts and Screening Report") on January 5, 2004. Marsden Dep. Ex. F; Marsden Dep. 151:7-24.

**Plaintiffs' Response to ¶ 28**: Undisputed

**ClearOne's Statement ¶ 29.** One of the questions on the Dorsey Conflicts and Screening Report asked Mr. Marsden to:

> Please identify your major clients who you would expect to become clients of Dorsey & Whitney LLP upon your joining the firm. Please also identify the adverse parties in the files on which you are currently representing these clients.

Exhibit G (annexed hereto) at page 1.

**Plaintiffs' Response to ¶ 29**: Undisputed.

**ClearOne's Statement ¶ 30.** In Plaintiffs' Response to the above question on the Dorsey Conflicts and Screening Report, Mr. Marsden identified "Susie Strohm" as one of his major

clients and identified several "adverse parties," but he did not identify the United States or the U.S. Department of Justice, or the U.S. Attorney's Office as an adverse party. Ex. G, page 2.

**Plaintiffs' Response to ¶ 30**: Undisputed. At the time that Mr. Marsden completed the Dorsey Conflicts and Screening Report, however, Mr. Strohm had yet to be indicted so there was no adverse party to list in connection with any criminal proceedings. Furthermore, Mr. Marsden testified that he "listed the filed matters." Marsden Dep. at 152:17-18. Mr. Marsden further testified that "the purpose of the form is to clear conflicts. I didn't know the status of the department of justice investigation. But I did not understand the department of justice investigation in whatever status it was in would present a conflict problem." *Id.* at 155:7-12. He also testified that he viewed the "department of justice investigation as pending" at the time he completed the Form. *Id.* at 156:2-3. *See also* Plaintiffs' Response to ¶ 14.

**ClearOne's Statement ¶ 31.** In addition, Mr. Marsden listed the SEC Action and other civil litigations on the Dorsey Conflicts and Screening Report, but he did not list any criminal investigation. Marsden Dep. Ex. F, page 2; Marsden Dep. 153:23-155:3.

**Plaintiffs' Response to ¶ 31**: *See* Plaintiffs' Responses to ¶¶ 14, 30.

**ClearOne's Statement ¶ 32.** After his arrival at Dorsey, the first thing that led Mr. Marsden to believe that Ms. Strohm might actually be criminally charged was when he was called by Assistant U.S. Attorney Stewart "Stu" Walz in April or May ***2007***. Marsden Dep. 165:24-166:11 (emphasis added).

**Plaintiffs' Response to ¶ 32**: Disputed. ClearOne has not accurately presented Mr. Marsden's testimony. As the cited passage makes clear, Mr. Marsden stated that the *principal* (not the *first*) thing after he joined Dorsey that caused him to believe that Ms. Strohm would actually be criminally charged was his discussion with Mr. Walz. Marsden Dep. 166:2-5 Mr. Marsden testified that he first learned that Ms. Strohm might be criminally charged in January 2003. *See* Marsden Dep. at 66:10-13. *See also* Plaintiffs' Response to ¶ 14.

**ClearOne's Statement ¶ 33.** By the Fall of 2003, ClearOne did not believe that there was a reasonable possibility of a criminal proceeding being brought and did not believe that any indictment of Susie Strohm was in the realm of possibilities. Deposition of Jefferson Wright Gross ("Gross Dep.") 43:14-44:20. Relevant portions of the Gross Dep. are attached hereto as Exhibit 5.

**Plaintiffs' Response to ¶ 33**: Disputed. On December 5, 2003 (*i.e.*, the Fall of 2003), ClearOne executed the ETA with Ms. Strohm, in which it referenced the existence of "a grand jury *being conducted* by the United States Department of Justice." *See* ETA at 1 (Recital C) (emphasis added). A copy of the ETA is attached hereto as Exhibit 6. As used in this sentence, the phrase "being conducted" indicates a present and continuing condition, and demonstrates that

ClearOne knew in the Fall of 2003 that the criminal investigation was on-going and criminal charges were possible.

**ClearOne's Statement ¶ 34.** By the Fall of 2003, ClearOne had made a decision to file a lawsuit against ClearOne's Directors and Officers liability carriers and would not have done so if it thought that there was a reasonable possibility of a criminal proceeding. Gross Dep. 44:12-20.

**Plaintiffs' Response to ¶ 34**: *See* Plaintiffs' Responses to ¶¶ 14, 33; *See also* Fact Reconciliation at ¶¶ 4, 33.

**ClearOne's Statement ¶ 35.** Asked at deposition about whether he was aware in 2003 that there was a "grand jury Department of Justice investigation ongoing at that point," ClearOne's representative Jeff Gross responded as follows:

> THE WITNESS: **Not ongoing. There were some subpoenas that were issued earlier in the year in 2003, and then it went quiet.**
>
> Q: (By Mr. Hancock) Okay. But it didn't go away; it was still out there?
>
> A: **We thought it had died. I mean, you never get a letter from the DOJ saying your client is in the clear or, you know, we're not pursuing this any further. But from communications with the U.S. Attorney's office, we got the sense that they were not going to pursue anything. That was the impression that we formed in 2003, in the summer and fall of 2003.**

Gross Dep. 30:1-13 (emphasis added).

**Plaintiffs' Response to ¶ 35**: The Plaintiffs do not dispute that the language from the deposition of Mr. Gross is accurately quoted above. *But see* Plaintiffs' Responses to ¶¶ 14, 33, 37.

**ClearOne's Statement ¶ 36.** The purpose of the indemnification provision's "subject to" clauses contained in Ms. Strohm's Employment Termination Agreement was to "mak[e] sure [ClearOne] complied with the Utah Code and bylaws to make sure that the company would not be subject to further derivative claims based on a disgruntled shareholder believing we provided either too much money or too great a benefit to either of those two persons." Gross Dep. 38:13-19.

**Plaintiffs' Response to ¶ 36**: *See* Plaintiffs' Response to ¶ 14.

## ARGUMENT

### I. The Undisputed Extrinsic Evidence Establishes, As A Matter Of Law, That ClearOne Understood And Intended The Engagement Agreements To Extend To The Criminal Case.

In its Memorandum, ClearOne largely concedes that its Rule 30(b)(6) representative, Michael Keough, testified just as Plaintiffs claimed he had. Over the course of his four and one-half hour deposition, Mr. Keough repeatedly testified that (i) the Engagement Agreements covered potential criminal actions related to the SEC Action, including the Criminal Case (*see* ClearOne Dep., at 33:2-20; 44:20-46:4; 111:10-112:2; 114:2-11; 117:8-118:4; 119:13-120:18; 122:3-10; 170:23-171:10; 175:12-22); (ii) ClearOne understood and agreed to pay interest (at 18% per annum) on any invoices that remained unpaid more than 30 days after receipt (*see id.*, at 110:9-15; 116:9-117:3); (iii) ClearOne understood and agreed to pay attorneys' fees incurred in connection with efforts to collect amounts due under the Engagement Agreements (*see id.*, at 110:16-111:1); and (iv) the 2004 Engagement Agreement was merely an amendment to the 2003 Engagement Agreement to reflect the change of law firms by Mr. Marsden, and the terms of the 2003 Engagement Agreement otherwise remained in effect (*see id.*. at 124-27).

Given the extent and clarity of Mr. Keough's testimony, it is no surprise that the bulk of ClearOne's Memorandum is spent trying to persuade the Court to disregard the testimony, or ignore it. ClearOne first asks the Court to entirely ignore ClearOne's own testimony, in favor of an application of the canons of contract interpretation rejected by this Court as being improper. ClearOne next complains that the questions asked of ***its own designated representative*** were objectionable because they were "leading," and argues that the testimony is inadmissible.

Finally, ClearOne asks the Court to prefer a series of marginally relevant misrepresentations it has cobbled together over its own clear, unequivocal, and extensive direct testimony.

None of these efforts prevent Plaintiff's motion for summary judgment from being granted. ClearOne designated Mr. Keough as its corporate representative, and as the person most knowledgeable to testify concerning the circumstances surrounding the negotiation and execution of the Engagement Agreements.[4] Mr. Keough's undisputed testimony is binding on ClearOne. *See United States v. Taylor*, 166 F.R.D. 356, 361 (M.D. N.C. 1996); *Sprint Commc'ns. Co., L.P. v. TheGlobe.com, Inc.*, 236 F.R.D. 524, 527 (D. Kan. 2006). ClearOne has not presented any direct evidence refuting its own unambiguous testimony. Accordingly, summary judgment in Plaintiffs' favor on the Engagement Agrcements is now appropriate.

### A. ClearOne Continues To Ignore This Court's Rulings And To Misstate Utah Law Concerning Contractual Interpretation.

In its Memorandum, ClearOne argues that under Utah law the Engagement Agreements must be strictly construed against their drafter, and that the Court should find that the Criminal Case is not covered because "responsibility for Ms. Strohm's legal expenses in the criminal proceeding is not clearly or unambiguously expressed in the Dorsey engagement letter." *See* ClearOne Memorandum pp. 20-22. ClearOne Memorandum, at 21. ClearOne's tacit assertion

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[4] Indeed, ClearOne admits that Mr. Keough is the only person with personal knowledge who can testify regarding ClearOne's understanding of the Engagement Agreements because "nobody else could be located who even recalled their existence." ClearOne's Memo. at 23.

here is that its own testimony should be disregarded in favor of application of this "strict construction" rule.[5]

If this argument sounds familiar, it is because ClearOne has made it, ***and this Court has rejected it***, on at least two previous occasions. *See* Defendant's Memorandum in Support of its Motion to Dismiss Plaintiffs' Complaint (served 9/26/2008), at 12 (arguing that claims based on the Engagement Agreements should be dismissed because ClearOne's "responsibility for Ms. Strohm's legal expenses in the criminal proceeding are not clearly or unequivocally expressed") *and* Order, dated 1/23/2009 (denying ClearOne's motion on this ground); *see also* Defendant's Memorandum in Support of Motion for Summary Judgment as to Plaintiff's Fourth Claim for Relief (served 4/3/2009), at 8 (arguing that "ambiguity in a contract is to be construed against the drafter") *and* Order, dated 8/20/2009 (denying ClearOne's motion).

Contrary to ClearOne's argument, Utah law is clear that "[o]nly if extrinsic evidence does not resolve the ambiguity is it appropriate to construe the document against its drafter." *Gen. Sec. Indem. Co. of Arizona v. Tipton*, 2007 UT App 109, ¶ 7, 158 P.3d 1121; *see also U.P.C., Inc. v. R.O.A. Gen., Inc.*, 1999 UT App 303, ¶ 39, 990 P.2d 945 (contract will be construed against drafter only if ambiguity cannot be resolved using extrinsic evidence). Thus, a Utah

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[5] In this section of its Memorandum, ClearOne spends considerable space arguing that the 2004 Engagement Agreement is ambiguous. *See* ClearOne's Memorandum at 20-22. Considering that this Court has already ruled that the Engagement Agreements are ambiguous, it is hard to see the point of this argument.

As Plaintiffs have previously stated, they disagree with the Court's prior ruling that the language of the Engagement Agreements is not sufficiently clear to allow the Court to rule that they to extend to the Criminal Case, without resort to extrinsic evidence. However, Plaintiffs recognize that the Court has so ruled.

court will only construe a contract against the drafter if the extrinsic evidence does not clarify the ambiguities in a contract.

Moreover, this Court has already rejected the argument ClearOne is advancing, and has articulated the established approach to resolving contractual ambiguity under Utah law:

> The letter agreements I have found them to be ambiguous. And then my first duty is to find evidence if it's available to give me the intent of the parties. And I don't think that means I just construe it against because then every ambiguous contract would be construed against in the way least favorable to the drafting party, and that's not our first duty to determine what the parties, in fact, agreed.

July 1st Transcript at 29:8-15. ClearOne has given the Court no reason to reconsider this ruling.

Here, the undisputed extrinsic evidence resolves any ambiguity as to whether the Engagement Agreements covered the Criminal Case. ClearOne ***itself*** testified over and over again that it was aware of a pending criminal investigation both in January 2003 and in March 2004, and that it understood it was engaging Mr. Marsden and his law firms to represent Ms. Strohm in these investigations and in any criminal case from them. Fact Reconciliation at ¶¶ 2-3, 28-33. In these circumstances, there is no reason to resort to the rule of construction that involves construing terms against the drafter. ClearOne's testimony and the other extrinsic evidence (*see infra pp. 10-13*) conclusively resolves any ambiguity regarding the scope and effect of the Engagement Agreements in favor of the Plaintiffs.

## B. Keough's Testimony Is Admissible And Binds ClearOne Under Rule 30(b)(6).

ClearOne's next effort to persuade the Court to disregard Mr. Keough's testimony is to argue that it (i) was beyond the scope of the Rule 30(b)(6) designation; and (ii) elicited on improper "leading" or "hypothetical" questions. These arguments are meritless.

### 1. *Keough's Testimony Was Not Beyond The Scope of the Rule 30(b)(6) Notice and Would Remain Persuasive Even If It Was.*

Although ClearOne asserts that Keough's testimony was beyond the scope of his Rule 30(b)(6) designation, it offers no substantive argument for its claim. ClearOne states only that Keough was designated "to testify about the engagement letter because nobody else could be located who even recalled their existence." But that is not an argument about whether the testimony given was within the Rule 30(b)(6) designation.

The Deposition Notice clearly stated that ClearOne was to be deposed, among other topics, with respect to the "circumstances surrounding [ClearOne's] negotiation and execution" of the Engagement Agreements and "[c]ommunications" regarding the Engagement Agreements. *See* Deposition Notice at Topics 10-11.[6] These topic designations must reasonably be read to include the parties' understanding of the terms of the Engagement Agreements. "Circumstance" is defined as "a condition, fact or event accompanying, conditioning or determining another: an essential or inevitable concomitant." *Webster's Ninth New Collegiate Dictionary* at 242 (1988) (a copy of this definition is attached hereto as Exhibit 7). As ClearOne's representative, Mr. Keough was required to testify not only about factual matters concerning these documents, but

[6] A copy of the Deposition Notice is attached to the Plaintiffs' Memorandum as Exhibit 7.

also concerning ClearOne's "subjective beliefs and opinions" when it negotiated and executed the Engagement Agreement. *See Taylor*, 166 F.R.D. at 361. Thus, Mr. Keough's testimony regarding ClearOne's understanding of the Engagement Agreement when they were executed was not only properly within the scope of Rule 30(b)(6), it was, in fact, required under the rule.[7]

ClearOne's arguments regarding the scope of its testimony as elicited through Mr. Keough are without merit, and ClearOne is bound by its designee's testimony regarding the Engagement Agreements. But even if that were not the case, Mr. Keough's testimony would still be relevant and persuasive. Mr. Keough is, after all, the ClearOne representative who signed the Engagement Agreements. He was the company's CEO at the time he signed the Engagement Agreements. And, he testified that he read the Engagement Agreements prior to signing them in order to form an understanding of ClearOne's obligations and duties. ClearOne Dep. at 108:9-109:8.[8]

**2.** *The Questions Asked Were Proper.*

Contrary to ClearOne's claim, Plaintiffs were entitled to ask leading questions of Mr. Keough at ClearOne's deposition. Rule 611(c) of the Utah Rules of Evidence states that "[w]hen a party calls . . . an adverse party, or a witness identified with an adverse party . . . , interrogation may be by leading question."

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7 ClearOne alleges that Mr. Keough only testified as to his current interpretation of the Engagement Agreements. *See* ClearOne's Memorandum at 24. ClearOne, however, does not cite to a single instance where Mr. Keough either testified as to his current testimony or limited his testimony to his current understanding. A review of the entire transcript of ClearOne's deposition demonstrates that Mr. Keough plainly testified several times regarding ClearOne's understanding of the Engagement Agreements at the time that they were executed.

8 In any event, Mr. Keough was also deposed as a fact witness and considering that, as ClearOne declares, no other person could even be located who remembers the Engagement Agreements, his testimony regarding the Engagement Agreements stands uncontroverted.

In this case, leading questions were appropriate for several reasons. First, Plaintiffs served a deposition notice on ClearOne, an adverse party, asking for *its* testimony. ClearOne designated Mr. Keough as its representative to testify regarding the Engagement Agreements under Rule 30(b)(6). Accordingly, for purposes of applying Rule 611(c), Mr. Keough was ClearOne. That is, Mr. Keough was an adverse party – not just a "witness identified with an adverse party." Under Rule 611(c), the use of leading questions is absolutely appropriate with an adverse party.[9]

Second, although ClearOne claims Mr. Keough is biased against ClearOne, it has presented no evidence that this is so. Mr. Keough did not testify that he harbored any "animus" or bias against ClearOne, only that he had been "involuntarily relieved of his position." ClearOne Memorandum, at 25. Since the filing of this lawsuit, Mr. Keough has in fact cooperated with ClearOne in defending the case. Mr. Keough agreed to function as ClearOne's Rule 30(b)(6) representative, and he agreed to meet with ClearOne's counsel prior to the deposition in order to go over documents and prepare for the deposition. ClearOne Dep. at 6:20-7:5, 8:22-9:6. Mr. Keough had no discussions with the Plaintiffs' counsel about the deposition prior to the deposition, other than to arrange time and place. *See id.* at 164:16-165:18. In short,

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[9] In support of its position, ClearOne cites a single unreported case from the Sixth Circuit which dealt with a witness "identified with an adverse party," not an adverse party as here. In that case, *Gates v. City of Memphis*, Case No. 98-5921, 2000 U.S. App. LEXIS 6713 at *6 (6th Cir. Apr. 6, 2000), the court did state the truism that there "may be instances" where the use of leading questions with a witness identified with an adverse party may not be proper. *Id.* But the court held that leading questions were proper in the circumstances before it. *Id.* at *6, *7. The case is hardly support for refusing leading questions here. For the Court's reference, a copy of the case is attached hereto as Exhibit 8.

ClearOne has presented nothing to suggest that Mr. Keough did anything other than testify fairly and truthfully to the questions presented during ClearOne's deposition.[10]

Third, even if asking leading questions of Mr. Keough had been improper, his testimony remains admissible because ClearOne did not timely object to these questions, and has therefore waived the objection. Under Rule 32(c)(3)(B), "[e]rrors and irregularities . . . in the form of the questions . . . which might be obviated, removed, or cured if promptly asserted are waived unless seasonable objection thereto is made at the taking of the deposition." Utah R. Civ. P. 32(c)(3)(B). Although ClearOne lodged numerous objected during the deposition, ClearOne did not object to the great bulk of Plaintiffs' questioning. The answers to these questions conclusively establish that the Plaintiffs are entitled to judgment as a matter of law.

The numerous examples from ClearOne's deposition where its testimony supports granting Plaintiffs' Renewed Motion, and where ClearOne did not object to the form of the question during its deposition include, among others, the following:

- ClearOne understood that Mr. Marsden was retained to represent Ms. Strohm in the SEC Action, the grand jury investigation, and any related criminal actions brought against her. *See* ClearOne Dep. at 44:20-45:8.
- ClearOne did not, upon reading the 2003 Engagement Agreement, believe it was limited solely to the SEC Action. *See id.* at 117:8-12.
- ClearOne not only understood that potential criminal indictments could be brought against Ms. Strohm when it executed the 2004 Engagement Agreement, it actually expected that such indictments would be brought. *See id.* at 175:15-22.

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[10] ClearOne's argument that Mr. Keough's testimony should be entirely disregarded on the ground that he is biased is not a proper argument at the summary judgment stage. Under Utah law, "'it is not the purpose of the summary judgment procedure to judge the credibility of the averments of the parties, or witnesses, or the weight of the evidence.'" *Best v. Daimler Chrysler Corp.*, 2006 UT App 304, ¶ 10, 141 P.3d 624 (*quoting W.M. Barnes Co. v. Sohio Natural Res. Co.*, 627 P.2d 56, 59 (Utah 1981)). Thus, it is not the Court's role at this stage of the proceeding to weigh the credibility of Mr. Keough's testimony offered on behalf of ClearOne.

- ClearOne agreed to pay invoices from Mr. Marsden for services rendered in representing Ms. Strohm as they were billed and within 30 days after receipt. *See id.* at 110:9-15.
- ClearOne agreed to pay interest at the annual rate of 18 percent on any amounts that remained unpaid after 30 days. *See id.* at 110:16-20.
- ClearOne agreed to pay attorneys' fees and costs associated with any successful action to enforce the Engagement Agreements. *See id.* at 116:9-16.

ClearOne's failure to object – during the deposition – to these questions means its form objection is waived. This testimony alone is a sufficient basis for granting the Plaintiffs' Renewed Motion in its entirety and the denial of ClearOne's Cross-Motion.

3. *Keough's Testimony Is Not "Contradictory."*

ClearOne's parting shot here is the claim that Mr. Keough's testimony was "contradictory." To set up this argument, ClearOne cites to Mr. Keough's testimony that in signing the 2004 Engagement Agreement he did understand that he was giving Strohm any more rights than those contained in the ETA. *See* ClearOne Memorandum, at 25. But then, instead of referring to Mr. Keough's understanding of Ms. Strohm's rights under the ETA, ClearOne substitutes its own analysis of the ETA and, astonishingly, implies that this is Mr. Keough's understanding of the ETA. *See* ClearOne's Memo. at 25. ClearOne studiously avoids Mr. Keough's actual testimony concerning the scope of the ETA because it makes clear he understood that the ETA, like the Engagement Agreements, obligated ClearOne to pay Strohm's legal fees in the criminal action, and to pay them as they were billed. *See* ClearOne Dep. at 67:20-72:12; 73:23-74:19. Fairly read, Mr. Keough's testimony regarding the rights granted under the ETA and Engagement Agreements is entirely consistent and ClearOne's attempted sleight-of-hand fails.

### C. The Other Relevant Extrinsic Evidence In Fact Supports ClearOne's Direct Testimony That The Engagement Agreements Extend To The Criminal Case.

ClearOne's last argument against its own clear testimony regarding the intended scope of the Engagement Agreements is its claim that a reasoned review of the so-called "true facts" shows that ClearOne did not intend the Engagement Agreements to extend to the Criminal Case. In fact, a "reasoned review" of the other extrinsic evidence shows that it supports ClearOne's direct testimony. ClearOne's arguments to the contrary are specious.

#### 1. *ClearOne's Alleged Belief That A Criminal Proceeding Was "Not A Reasonable Probability" In The Fall of 2003.*

ClearOne argues (at 27) that "by the Fall of 2003, ClearOne did not believe that there was a reasonable possibility of a criminal proceeding being brought against Ms. Strohm. . . ." Although it is not entirely apparent from ClearOne's brief, this "fact" is presumably offered to support the claim that ClearOne did not intend the 2004 Engagement Agreement to extend to the Criminal Case. ClearOne can make this argument only by very carefully selecting the facts it acknowledges.

a. It is beyond peradventure that ClearOne's alleged belief regarding the status of a criminal investigation *after* the execution of the 2003 Engagement Agreement is irrelevant to determining its intent *at the time that it entered into the 2003 Engagement Agreement.* Moreover, in January of 2003 ClearOne indisputably understood that criminal charges could be brought against Ms. Strohm.

– It is undisputed that the day before ClearOne executed the 2003 Engagement Agreement, ClearOne "was advised that the U.S. Attorney's Office had begun an investigation stemming from the complaint in the SEC action." Plaintiffs' Memorandum, SOF ¶ 3 & Ex. 3 at

170. Furthermore, on behalf of ClearOne, Mr. Keough testified that in January of 2003 the company understood that criminal charges against Ms. Strohm were a possibility and that it entered into the 2003 Engagement Agreement with the understanding that it would be liable for the payment of Ms. Strohm's fees in any criminal proceeding. *See, e.g.,* ClearOne Dep., at 33:2-20; 44:20-46:4; 111:10-112:2; 114:2-11; 117:8-118:4; 119:13-120:18; 122:3-10; 170:23-171:10; 175:12-22.

– Just seven days *after* ClearOne signed the 2003 Engagement Agreement, it entered a "Joint Defense Agreement" with Ms. Strohm and Ms. Flood which similarly recites that ClearOne has been notified "that a criminal investigation is underway ***that arises out of or is connected to the allegations made in the SEC Action*** and that this investigation is aimed at both ClearOne and certain individual current or former employees of ClearOne." Joint Defense Agreement, at 1. In the Joint Defense Agreement, ClearOne agreed that it and Strohm had "a mutuality of interest" in defending the criminal investigation. *Id.* at 2. The Joint Defense Agreement was signed by ClearOne's counsel, Ms. Flood's counsel Max Wheeler, and by Mr. Marsden, as Ms. Strohm's counsel. *See id.* at 7.

Thus, there can be no legitimate dispute that, at the time ClearOne executed the 2003 Engagement Agreement, it understood that Ms. Strohm could be the subject of a criminal proceeding and that the 2003 Engagement Agreement engaged Mr. Marsden and his firm to represent Ms. Strohm in the grand jury investigation and any future criminal proceeding.

b. Whatever ClearOne claims to have believed in "the Fall of 2003," it is undisputed that in December of 2003 ClearOne recognized a criminal investigation related to the SEC

Complaint remained ongoing, and that ClearOne knew Mr. Marsden was retained to represent Ms. Strohm in connection with that matter.

– Most tellingly, on December 5, 2003, ClearOne executed the Employment Termination Agreement with Strohm. In that Agreement, ClearOne recited that it understood that Mr. Marsden had been employed "to defend [Strohm] in the SEC Action and the Related Proceedings," which included "a grand jury investigation being conducted by the United Stated Department of Justice." ETA, at 1.

–Finally, ClearOne's direct testimony regarding its understanding of the status of the criminal case at the time it entered the 2004 Engagement Agreement is unequivocal:

> Q. And when you signed [the 2004 Engagement Agreement], nobody had informed you that the grand jury investigation was over and criminal actions weren't going to be brought against Ms. Strohm, had they?
>
> A. No.
>
> Q. So you understood that there were still potential indictments that could come down and criminal action brought against Ms. Strohm when you signed [the 2004 Engagement Agreement], correct?
>
> A. Yes. ***In fact, that was my expectation.***
>
> Q. And you understood, based on that expectation, that was still the scope of Mr. Marsden's representation under [the 2003 Engagement Agreement and the 2004 Engagement Agreement], correct?
>
> A. Yes. ***There were no limits ever decided on that representation.***

ClearOne Dep., at 175 (emphasis added).

In addition to this is, of course, the fact that ClearOne paid Dorsey's invoices for fees incurred in connection with the grand jury investigation that preceded the Criminal Case, and that it continued to pay Dorsey's invoices for over a year after the commencement of the Criminal Case with total payments in excess of $1.8 million. A public company such as ClearOne with fiduciary obligations to its shareholders cannot, as ClearOne now suggests, have expended such amounts simply out of charity.

2. *Marsden's Background, The Work Done Prior to 2007, The Work Left To Be Done When Marsden Moved Firms, And The Like.*

ClearOne's other "true facts" in addition to being inaccurate, are simply irrelevant.

– ClearOne makes much of the fact that Mr. Marsden did not, and does not, hold himself out as a white-collar criminal specialist. ClearOne asserts that "it defies logic" to believe that ClearOne would commit itself to paying Marsden to defend Strohm "in a then-hypothetical and unanticipated federal criminal proceeding" given his background. ClearOne Memorandum, at 26. But this "fact," simply cannot bear the weight ClearOne seeks to place on it.

First, ClearOne has directly testified (through Keough) that at the time the Engagement Agreements were signed it knew a criminal investigation was ongoing, and it understood it was engaging Mr. Marsden to represent Strohm in connection with the investigation and any indictments that might come out of the investigation. *See* Fact Reconciliation at 27-37. Second, as ClearOne points out, Keough also stated he did not know whether Mr. Marsden had experience in handling criminal matters. But the conclusion to be drawn from ClearOne's

testimony is that ClearOne considered the particulars of Mr. Marsden's background to be irrelevant.[11]

– ClearOne also makes much of the fact that prior to 2007 there are only a few time entries that directly reference work related to criminal liability. Again, ClearOne draws the wrong conclusion from these facts. The important point is that prior to 2007 Mr. Marsden (and other lawyers working for him) performed work that was clearly related to the grand jury investigation, and ClearOne paid for this work without complaint. Rather than undermining ClearOne's testimony, these extrinsic facts bolster the testimony that the Engagement Agreements were intended to extend to the Criminal Case.

– ClearOne's argument regarding the Dorsey Conflicts and Screening Report is also misplaced. Mr. Marsden testified that he did not list any criminal proceeding against Ms. Strohm because she had not been indicted when he completed the report and there was no adverse party to list. *See* Marsden Depo. at 152:7-12. Mr. Marsden also testified that he did not believe the grand jury investigation, regardless of its status at the time he switched firms, would present a conflict necessitating it being listed on the report. *See id.* at 155:7-12.

–ClearOne's argument regarding the amount of work it believed remained to be completed on the SEC Action or any related proceedings at the time it executed the 2004 Engagement Agreement is irrelevant to the parties' intent when they executed the 2003 Engagement Agreement. As discussed above, the parties intended the Engagement Agreements

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[11] ClearOne's argument regarding Mr. Marsden's background also misrepresents Mr. Marsden's actual testimony on this issue. Mr. Marsden specifically testified that he had handled criminal matters both before and after the execution of the 2003 Engagement Agreement. *See* Marsden Dep. at 19:1-8; 20:2-3; 20:8-11; 150:22-151:6.

to be treated as one contract. Furthermore, ClearOne cannot dispute that the grand jury investigation was ongoing at the time it executed the 2004 Engagement Agreement, considering that Ms. Strohm was eventually indicted.

## II. The Parties Intended For The Terms Of The 2003 Engagement Agreement To Be Effective Even After The Execution Of The 2004 Engagement Agreement

### A. The 2004 Engagement Agreement Was Merely An Amendment

ClearOne's assertion that the 2004 Engagement Agreement somehow entirely supplants the 2003 Engagement Agreement lacks any support. ClearOne makes this argument solely by reference to the language of the 2004 Engagement Agreement. But this Court has already ruled that the Engagement Agreements are ambiguous. This means that the parties and the Court now must look to extrinsic evidence.

Mr. Keough testified on behalf of ClearOne that ClearOne understood the 2004 Engagement Agreement to merely be an update to the 2003 Engagement Agreement with all the terms of that earlier agreement remaining in effect. *See* ClearOne Dep. at 124-27. ClearOne clearly testified that the 2004 Engagement Agreement merely reflected the fact that Mr. Marsden had changed law firms. *See id.* Indeed, ClearOne's own counsel previously represented to this Court that the Engagement Agreements are intended to be treated as one agreement. *See* transcript of hearing held July 1, 2009 (the "July 1st Transcript") at 25:24-26:9. Relevant portions of the July 1st Transcript are attached hereto as Exhibit 9. ClearOne, however, does not respond to this testimony and does not cite to any extrinsic evidence at all to support its new position. This is not surprising given that ClearOne has acknowledged that Mr. Keough is the only witness on its side who can testify as to the meaning of the Engagement Agreements. *See*

ClearOne's Memorandum. at 23. Given the Court's previous ruling on ambiguity, ClearOne's rehashed textual arguments are irrelevant to the meaning of the Engagement Agreements, and Mr. Keough's undisputed testimony as ClearOne's representative conclusively establishes the intent of the parties.

Furthermore, ClearOne's reasoning that the 2004 Engagement Agreement was required to incorporate the terms of the 2003 Engagement Agreement is backwards. As discussed, ClearOne has already testified that the 2004 Engagement Agreement was merely an amendment to the 2003 Engagement Agreement. *See* ClearOne Dep. at 124-27. As an amendment, the 2004 Engagement Agreement, like any other contractual amendment, was not required to incorporate the terms of the agreement that it was amending. The terms of the 2003 Engagement Agreement remained in effect after ClearOne executed the 2004 Engagement Agreement with the only difference being a reflection in certain terms showing that Mr. Marsden had changed law firms. ClearOne's inverted assertions misunderstand the purpose of the 2004 Engagement Agreement and are not persuasive.[12]

**B. ClearOne Is Bound By The Terms Of The Engagement Agreements**

ClearOne incorrectly argues that even if the provisions of the 2003 Engagement Agreement are still effective, ClearOne should not have to comply with the terms to which it

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[12] In any event, ClearOne's own arguments erode the very point it is trying to make. For example, the fact that the 2004 Engagement Agreement did not require Ms. Strohm or ClearOne to provide a separate retainer demonstrates that the parties intended the 2003 Engagement Agreement, which did require a retainer, to remain in effect. The fact that the 2004 Engagement Agreement does not have interest or attorneys' fee provision likewise demonstrates that the parties meant for the terms of the 2003 Engagement Agreement to remain in effect. The fact that there were no substantive changes made by the 2004 Engagement Agreement demonstrates that the 2004 Engagement Agreement was only an amendment to the 2003 Engagement Agreement intended to reflect a change of law firms by Mr. Marsden.

voluntarily agreed. There is no basis, however, for excusing ClearOne from the agreement it voluntarily executed with the Plaintiffs.

ClearOne's argument that requiring it to pay for attorneys' fees incurred by the Plaintiffs in this case, would "constitute a departure from the prevailing American Rule" (ClearOne's Memorandum, at 32) has no basis in law. Utah courts, like every other court in the United States, recognize that contractual provisions requiring the payment of attorneys' fees incurred in the enforcement of the contract are valid and enforceable.[13] This "departure from the prevailing American Rule" is universally recognized in the American judicial system at both the state and federal level. ClearOne has no grounds for arguing that it would be unreasonable to require it to abide by the agreement it signed to pay the attorneys' fees incurred by the Plaintiffs in enforcing the Engagement Agreements.

Likewise without merit is ClearOne's assertion that the 18% percent interest rate it agreed to pay is somehow unreasonable. ClearOne asks this Court to re-write its agreement to pay 18% interest because it is "significantly greater than the reasonable time value of money over the last 2 years." *See* ClearOne's Memorandum, at 32. Remarkably, ClearOne fails to cite to any evidence or legal authority in support of this contention. ClearOne agreed to pay 18% interest on past-due invoices, and it is now bound to comply with its contractual obligations.[14]

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[13] Likewise, American courts universally enforce statutory provisions requiring the payment of attorneys' fees.

[14] *See Rio Algom Corporation v. Jimco Ltd.*, 618 P.2d 497, 505 (Utah 1980) (stating that "[a] court will not, however, make a better contract for the parties than they made for themselves").

Finally, ClearOne's suggestion that Dorsey cannot bill at a rate higher than $255 per hour is contrary to the express terms of the Engagement Agreements.[15] First, the 2003 Engagement Agreement, specifically explains that "billing shall be based on the normal hourly rates charged for employees of this firm who work on this matter." 2003 Engagement Agreement at 2. The 2004 Engagement Agreement contains a similar provision. *See* 2004 Engagement Agreement at 1 ("Our fees are ordinarily based primarily on our usual and customary hourly rates"). These are common provisions for attorney retainer agreements, and nothing in either of the Engagement Agreements suggests that rates will be capped at $255 per hour. To the contrary, both of the Engagement Agreements provide that the rates charged are subject to review and periodic adjustments. *See* 2003 Engagement Agreement at 2; 2004 Engagement Agreement at 1. Dorsey, pursuant to the Engagement Agreements, has charged its usual and customary rates in both the Criminal Case and in this case. Dorsey, therefore, is entitled to payment in full for the services it has performed and which ClearOne agreed to pay.

## III. Material Issues of Fact Prevent Granting ClearOne's Cross-Motion Regarding The Plaintiffs' Remaining Claims

In Points III-V of ClearOne's Memorandum, ClearOne argues that it is entitled to summary judgment on certain of the Plaintiffs' claims for relief either because they are now moot or because they provide no basis for relief.[16] For the reasons discussed below, significant

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[15] The Court has previously ruled that the issue of reasonableness of fees will be tried separately in this case. ClearOne's arguments regarding the rates charged by Dorsey are, therefore, not proper at this stage of the proceedings. Regardless, the Plaintiffs are compelled to respond to these arguments.

[16] In the event that the Court grants the Plaintiff's Renewed Motion, the Plaintiffs in the interest of judicial economy, will voluntarily dismiss without prejudice its First, Second, Fourth, Fifth, Sixth, and Eighth claims in this case.

factual issues remain with respect to the Plaintiffs' First, Second, Fourth, Fifth, Sixth, and Eighth Claims for Relief. Therefore, ClearOne is not entitled to summary judgment on these claims.

### A. Ms. Strohm Has Valid Claims Against ClearOne Based On The Employment Termination Agreement (Second And Eighth Claims)

Despite the fact that the Court has already ruled that Ms. Strohm is entitled to mandatory indemnification under Utah Code Ann. § 16-10a-903, Ms. Strohm's claims based on the ETA are not moot because the ETA provides for the recovery of attorneys' fees and costs that are not recoverable under her claim for mandatory indemnification and provides a contractual claim for her attorneys' fees incurred to enforce her rights under the ETA .

Mandatory indemnification entitled Strohm to recover her fees and costs in connection with those claims on which she was successful in the Criminal Case and her fees and costs in connection with the actions to enforce her mandatory indemnification rights in this case. Ms. Strohm's claims under the ETA, on the other hand, would permit her to recover all of her fees in connection with both the Criminal Case and this current proceeding.[17] Thus, the claims under the ETA would permit Ms. Strohm potentially to recover more of her fees and costs than she could under her claims for mandatory indemnification. Moreover, with respect to the reasonableness of fees, a different standard applies to fee awarded pursuant to a contract such as the ETA as opposed fees awarded pursuant to statute. Thus, the Plaintiffs' claims based on the ETA, if granted, could result in a recovery that differs significantly from their recovery based

[17] The Plaintiffs are not seeking to recover payment twice for the same fees and costs and certainly concede that they are only entitled to be paid once for the services rendered.

solely on mandatory indemnification. Ms. Strohm's claims under the ETA, therefore, are not moot.

Furthermore, Ms. Strohm has a valid claim for permissive indemnification. As reflected in the ETA, ClearOne agreed to indemnify Ms. Strohm under Utah Code Ann. § 16-10a-902. Prior to making this agreement, ClearOne formed a special committee to investigate Ms. Strohm's actions. The committee eventually determined that Ms. Strohm had acted in good faith,[18] and, on that basis, ClearOne entered into the ETA to reflect its agreement to indemnify Ms. Strohm. Thus, ClearOne is contractually bound to indemnify Ms. Strohm in accordance with Section 902.

It is undisputed that ClearOne's board resolution purporting to be conclusive on whether Strohm acted in good faith is based solely on the one count of perjury on which Ms. Strohm was convicted. Section 902(3), however, is explicit that the "termination of a proceeding by . . . conviction . . . is not, of itself, determinative that the director did not meet the standard of conduct described in this section." Utah Code Ann. § 16-10a-902(3). Thus, ClearOne cannot base its determination regarding whether Ms. Strohm acted in good faith based solely on her minimal conviction. Moreover, the fact that Ms. Strohm was acquitted on the seven more substantive charges against her is strong evidence that her actions were in good faith and that she did meet the requisite standard under the permissive indemnification provisions. Thus, material issues of fact exist preventing summary judgment in favor of ClearOne on these claims.

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[18] This determination by the special committee squarely contradicts ClearOne's claim that it has not yet made determination that Ms. Strohm met the requisite standard of conduct. *See* ClearOne's Memorandum at 35.

### B. Ms. Strohm's Sixth Claim Is A Viable And Alternative Claim For Relief

Ms. Strohm's claim for permissive indemnification in her Sixth Claim is an alternative claim meant to seek relief should this Court determine that the ETA does not obligate ClearOne to indemnify Strohm under Section 902. As discussed above, ClearOne's obligation to indemnify Ms. Strohm under Section 902 is reflected in the ETA. If the Court, however, were to find that ETA does not cover any rights Ms. Strohm may have to permissive indemnification, the fact remains that Ms. Strohm submitted the required undertakings to ClearOne, ClearOne's special committee determined that Ms. Strohm had meet the requisite standard of conduct, and ClearOne agreed to indemnify Ms. Strohm under Section 902. Thus, the Sixth Claim remains a viable and alternative ground for relief should the Court at some point determine that the ETA does not cover ClearOne's obligations to indemnify Ms. Strohm under Section 902.

### C. The Plaintiffs' Claims For Unjust Enrichment And Promissory Estoppel May Be Viable Claims Depending On This Court's Ruling

Finally, ClearOne argues that the Plaintiffs' claims of unjust enrichment and promissory estoppel should be dismissed because they are equitable claims that relate to subject matter governed by an express contract. The Plaintiffs agree that, under Utah law, if the Court determines that either the Engagement Agreements or the ETA govern the subject matter of the Plaintiffs' unjust enrichment or promissory estoppel claims, these claims would no longer be viable. On the other hand, if the subject matter of these claims is not governed by an express contract then the Plaintiffs still have valid claims based on unjust enrichment and promissory estoppel.

To the extent that these claims remain viable, the Plaintiffs have properly set forth allegations in the Amended Complaint establishing both of these claims. With respect to the unjust enrichment claim, ClearOne is incorrect that Dorsey did not confer a benefit on it. Mr. Keough testified that ClearOne wanted to ensure that Ms. Strohm was represented in the SEC Action and the Criminal Case in order to ensure her cooperation with ClearOne in the legal actions pending against it at that time. ClearOne Dep. at 47:12-48:6; 55:14-58:18; 73:6-74:19; 96:23-97:12; 100:1-101:8. Furthermore, there can be no doubt that an acquittal on seven of the eight claims against one of its former officers conferred a benefit on ClearOne from a public perception standpoint. Likewise, ClearOne's statement that the Plaintiffs' claim for promissory estoppel relates only to promises contained in a contract is incorrect. A review of the Amended Complaint demonstrates that this claim is based on various promises made to the Plaintiffs and not just those contained in a contract. Thus, to the extent these claims are not governed by an express contract, they remain viable and the Court should deny ClearOne's Cross-Motion.

## CONCLUSION

For the foregoing reasons, the Plaintiffs urge the Court to grant their Renewed Motion in its entirety. The Plaintiffs also respectfully request that the Court deny ClearOne's Cross-Motion in its entirety. Finally, the Plaintiffs ask for such other and further relief as is just and proper.

Dated this 23rd day of December, 2009.

DORSEY & WHITNEY LLP

Milo Steven Marsden
Cameron M. Hancock
*Attorneys for Plaintiffs*

## CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of December, 2009, true and correct copies of the foregoing **PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFF'S THIRD CLAIM FOR RELIEF (ENGAGEMENT AGREEMENTS)**, were served upon the person named below, at the addresses set out below either by mailing, postage prepaid, hand-delivery, Federal Express, telecopy, e-mail, or ECF as indicated below:

| | |
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| James E. Magleby (7247)<br>magleby@mgpclaw.com<br>Jennifer Fraser Parrish (11207)<br>parrish@mgpclaw.com<br>Magleby & Greenwood, P.C.<br>170 South Main Street, Suite 350<br>Salt Lake City, Utah 84101-3605 | ☐ U.S. Mail<br>☐ Federal Express<br>☐ Hand-Delivery<br>☐ Telecopy<br>☒ E-mail<br>☐ ECF |
| Brian S. Cousin<br>bcousin@seyfarth.com<br>Neil A. Capobianco<br>ncapobianco@seyfarth.com<br>Seyfarth Shaw LLP<br>620 Eighth Avenue<br>New York, New York 10018 | ☐ U.S. Mail<br>☐ Federal Express<br>☐ Hand-Delivery<br>☐ Telecopy<br>☒ E-mail<br>☐ ECF |

Milo Steven Marsden

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# EXHIBIT 1

## Exhibit 1

## RECONCILIATION OF CLEARONE'S RESPONSE TO PLAINTIFFS FACTS

The following reconciliation is filed in connection with the Plaintiffs' Memorandum In Opposition To Defendant's Cross-Motion For Summary Judgment And Reply In Support Of Plaintiffs' Renewed Motion For Partial Summary Judgment On Plaintiff's Third Claim For Relief (Engagement Agreements) (the "Plaintiffs' Reply Brief").

ClearOne did not contest several facts submitted by Plaintiffs. The following fact reconciliation establishes that ClearOne failed to controvert the material facts presented by the Plaintiffs as required by Rules 7(c)(3)(B) and 56 of the Utah Rules of Civil Procedure.

| Plaintiff's Statement of Facts | ClearOne's Response | Reconciliation |
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| 1. Strohm was employed by ClearOne from approximately February 1996 until December 5, 2003, and held the position of Chief Financial Officer ("CFO") during the time period of the claims asserted in the Criminal Case. See Amended Compl. at ¶¶ 5, 8, 10; Answer to Amended Compl. at ¶¶ 5, 8, 10. | No Response. | These facts are undisputed. |
| 2. On or about January 15, 2003, the Securities and Exchange Commission commenced a civil action (the "SEC Action") against ClearOne, Strohm, and Frances M. Flood ("Flood"), who was then ClearOne's CEO. | No Response. | These facts are undisputed. |
| 3. In early 2003, while the SEC Action was pending, the U.S. Attorneys' Office in and for the District of Utah ("Utah AUSA") impaneled a grand jury to begin a criminal investigation that paralleled the SEC Action. See Transcript of Deposition of Milo Steven Marsden, October 14, 2009, at 65-67. Relevant portions of | No Response. | These facts are undisputed. |

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| this transcript are attached hereto as Exhibit 2. On January 28, 2003, the Utah AUSA informed ClearOne that it "had begun an investigation stemming from the complaint in the SEC action described above." ClearOne 2004 Form 10-K, at 170, relevant portions of which are attached hereto as Exhibit 3. | | |
| 4. The criminal investigation remained open through 2007. In May of 2007, the Utah AUSA contacted Dorsey lawyer Milo Steven Marsden and informed him that Strohm was a target of the grand jury. Mr. Marsden promptly informed ClearOne's counsel of this development. See E-mail exchange between Mr. Marsden and Ray Etcheverry dated May 21, 2007, and May 30, 2007 (the "Etcheverry E-mail), a copy of which is attached hereto as Exhibit 4. On or about July 25, 2007, the grand jury returned an Indictment against Strohm and Flood making fundamentally the same allegations against Strohm as had been made in the SEC Action. (A copy of the Indictment is attached to the Original Complaint as Exhibit K). | Response to ¶ 4: Denied that the criminal investigation remained open through 2007. By the Fall of 2003, ClearOne did not believe that there was a reasonable possibility of a criminal proceeding being brought and did not believe that any indictment of Susie Strohm was in the realm of possibilities. Gross Dep. 43:14-44:20. ClearOne had made a decision to file a lawsuit against ClearOne's Directors and Officers liability carriers and would not have done so if it thought that there was a reasonable possibility of a criminal proceeding. Gross Dep. 44:12-20.<br><br>Moreover, in the May 2007 E-mail exchange between Mr. Marsden and Ray Etcheverry, Mr. Marsden asked ClearOne to acknowledge that the grand jury proceeding was covered by Ms. Strohm's Employment Termination Agreement. The Dorsey engagement letter was not raised or discussed in this E-mail exchange. See Pls' Br. Ex. 4. | ClearOne's alleged belief that a criminal indictment might not actually occur does not dispute the fact that the criminal investigation remained open through 2007 and ultimately resulted in Ms. Strohm and Ms. Flood being indicted. *See Treloggan v. Treloggan,* 699 P.2d 747, 748 (Utah 1985) (a declarant's unsubstantiated opinions or beliefs do not contest a fact). A review of the deposition testimony of Mr. Gross establishes he did not testify that he had personal knowledge that the criminal investigation had been closed. Accordingly, his deposition testimony does not dispute these facts. *Id.* (declarant's testimony that is not based on personal knowledge may not be considered on a motion for summary judgment). Moreover, ClearOne's hope in the Fall of 2003 (9-10 months after signing the 2003 Engagement Agreement) that a criminal proceeding may not occur is irrelevant to determining the parties intent regarding the scope of the |

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| | | Engagement Agreements retaining Mr. Marsden to represent Strohm.<br><br>At the time ClearOne entered into the 2003 Engagement Agreement, ClearOne understood that a criminal investigation was underway that was aimed at ClearOne, Susie Strohm, and Fran Flood (the "DOJ Action") *See* ClearOne Depo. at 50:3-52:22 Faced with the SEC Action, DOJ Action, and possible future criminal indictments against Susie Strohm and Fran Flood, on or about February 7, 2003, ClearOne, Susie Strohm and Fran Flood entered into a "Joint Defense Privilege and Confidentiality Agreement," a copy of which is attached to the Plaintiffs' Reply Brief as Exhibit 3. The Joint Defense Agreement was signed by ClearOne's criminal counsel, signed by Frances Flood's criminal counsel Max Wheeler, and signed by Strohm's counsel Mr. Marsden. *See* Joint Defense Agreement at 7. Recitals B, E, and F to the Joint Defense Agreement state as follows:<br><br>B. ClearOne has been notified by the United States Department of Justice that a criminal investigation is underway that arises out of or is connected to the allegations made in the SEC Action and that this investigation is aimed at both ClearOne and certain individual current and former employees of ClearOne (the |

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| | | "DOJ Action").<br><br>E. The undersigned counsel believe the SEC Action, DOJ Action, Investor Suits, and Anticipated Actions (collectively the "Proceedings") relate to or involve common issues and concerns of their respective clients and that such clients have a mutuality of interests in defending the Proceedings.<br><br>F. As a result of the Proceedings, the undersigned counsel anticipate civil or criminal discovery in the form of interviews, testimony, and/or production from ClearOne, its current or former employees, its business partners, affiliates, agents, or others with whom it does or has done business (the "Discovery").<br><br>The clear terms of the Joint Defense Agreement establishes that ClearOne understood that the scope of Mr. Marsden's representation of Ms. Strohm included defending her against criminal investigations and subsequent criminal proceedings. *See also* ClearOne Dep. at 50-57:4 The Joint Defense Agreement memorialized prior oral agreements. *Id.* at 59:6-21.<br><br>ClearOne does not dispute that on May 21, 2007, Mr. Marsden informed ClearOne that Strohm had been indicted. ClearOne, however, fails to point out that the Employment |

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| | | Termination Agreement ("ETA") drafted by and entered into by ClearOne on December 5, 2003, a copy of which is attached to the Plaintiffs' Reply Brief as Exhibit 6, states in its recitals that the scope of Mr. Marsden's representation of Strohm included the grand jury investigation and any resultant subsequent proceedings. *See* ETA at Recitals C & E. Accordingly, it is undisputed that several months after Mr. Gross's belief in September 2003 that the criminal proceedings might not move forward, ClearOne still understood Mr. Marsden was retained to defend Strohm any future criminal proceedings. |
| 5. Thereafter, the grand jury returned two superseding indictments as a result of its continuing investigation. The first added an additional criminal offense for making material misrepresentations to ClearOne's auditors. The second added two counts of perjury against Strohm. (Copies of Superseding Indictments are attached to the Original Complaint as Exhibits L & M). | No Response. | These facts are undisputed. |
| 6. The Criminal Case went to trial on February 2, 2009. After four weeks of trial, the jury returned its verdict acquitting Strohm on seven of the eight counts in the Indictment. (A copy of the verdict in the Criminal Case is | No Response. | These facts are undisputed. |

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| attached to the Amended Complaint as Exhibit AA). | | |
| 7. On January 29, 2003 – the day after the Utah AUSA formally notified ClearOne of the pendency of its criminal investigation – ClearOne (and Ms. Strohm) executed an engagement agreement with Milo Steven Marsden, who was then employed as a partner at the law firm of Bendinger, Crockett, Peterson & Casey, PC (the "2003 Engagement Agreement"). (A copy of this agreement is attached to the Original Complaint as Exhibit B.). | No Response. | These facts are undisputed. |
| 8. Michael Keough executed the 2003 Engagement Agreement on behalf of ClearOne. Id. at 3. At the time, Mr. Keough was "interim CEO" of ClearOne. See Transcript of deposition of ClearOne, October 7, 2009, (the "ClearOne Depo.") at 23. The entire transcript of the ClearOne Depo. is attached hereto as Exhibit 5. Within two months, Keough was named CEO. Id. | No Response. | These facts are undisputed. |
| 9. In the 2003 Engagement Agreement, ClearOne engaged Mr. Marsden and his firm "to represent Susie Strohm's interests in connection with the SEC civil complaint, referenced above, and in connection with further related investigations and litigation." 2003 Engagement Agreement at 1 (emphasis added). | No Response. | These facts are undisputed. |

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| 10. In the 2003 Engagement Agreement, ClearOne further agreed:<br><br>a. that "ClearOne will pay the full amount of [the] bill within thirty days after receipt";<br><br>b. that "[a]ny amount billed and unpaid after such thirty day period shall bear and accrue interest at the rate of 18% per annum from the date billed until paid";<br><br>c. that Mr. Marsden and his firm would be entitled to recover "all reasonable costs expended in connection with collecting amounts due under this Agreement, including reasonable attorneys' fees"; and,<br><br>d. that ClearOne would be jointly and severally liable with Ms. Strohm for payment of all amounts billed under the 2003 Engagement Agreement;<br><br>Id. at 1-2. | No Response. | These facts are undisputed. |
| 11. In early 2004, Mr. Marsden left the Bendinger Crockett law firm to join Dorsey. On March 31, 2004, Mr. Marsden wrote to ClearOne (and Ms. Strohm) to inform them that he had left Bendinger Crockett and had joined Dorsey (the "2004 Engagement Agreement"). 2004 Engagement Agreement at 1. (A copy of this agreement is attached to the Original Complaint as Exhibit C.). The letter states that "[o]ur engagement agreement needs | No Response. | These facts are undisputed. |

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| to be updated to reflect this move." Id. (The 2003 Engagement Agreement and 2004 Engagement Agreement are collectively referred to herein as the "Engagement Agreements"). | | |
| 12. Mr. Keough executed the 2004 Engagement Agreement on behalf of ClearOne. Id. | No Response. | These facts are undisputed. |
| 13. In the 2004 Engagement Agreement, ClearOne confirmed that it had engaged Mr. Marsden and Dorsey "to represent Susie Strohm in connection with the SEC civil complaint . . . and in connection with further related investigations and litigation. . . ." Id. | Response to ¶ 13: Denied as selectively quoted. The Dorsey engagement letter states as follows:<br><br>In particular, this letter confirms your engagement of Dorsey & Whitney, LLP ("the firm") to represent Susie Strohm in connection with the SEC civil complaint, referenced above, and in connection with further related investigations and litigation including, among others, Anderton v. ClearOne Communications, Inc., et al, Master File No. 2:03-CV-0062-PGC; John Gorey, IRA v. Frances Flood, et al., Civil No. 030918066; and E-Bond Epoxies, Inc. Profit Sharing. Plan and Trust v. Frances Flood et al., Civil No. 030906061. The letter further confirms our discussions and agreements about our services and charges. | The content of the Second paragraph of the 2004 Engagement Agreement is undisputed. |
| 14. As the "update" to the terms of the 2003 Engagement Agreement, ClearOne further agreed,<br><br>a. to pay Dorsey's "usual and | Response to 14: Denied. The Dorsey engagement letter states in relevant part as follows:<br><br>As you know, I recently left | Paragraph 14 remains undisputed. Interestingly, the portions of the 2004 Engagement Agreement quoted by ClearOne establish: (1) ClearOne agreed to pay |

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| customary hourly rates" (Id.); and<br><br>b. to pay Dorsey's bill "on receipt" (Id.). | the law firm of Bendinger, Crockett, Peterson & Casey, and joined the law firm of Dorsey & Whitney LLP. Our engagement agreement needs to be updated to reflect this move. The rest of this letter is intended to serve as the update.<br><br>2. Fees, Disbursements and Billing. **Our fees are ordinarily based primarily on our usual and customary hourly rates.** My current hourly rate is $255 Our hourly rates are subject to adjustment from time to time. Our fees may also be affected by factors such as the amount involved in the representation, unusual time constraints, use of prior work product, and overall value of the services.<br><br>* * * * **We will submit monthly statements,** describing services performed, and stating fees and other charges and total discounts. **Payment will be due on receipt.**<br><br>Notably, the Dorsey engagement letter did not attempt to incorporate by reference any of the specific terms set forth in the Bendinger engagement letter. To the contrary, the Dorsey engagement letter recited detailed "Fees, Disbursements and Billing" terms that would apply to services performed by Dorsey. Significantly, Mr. | Dorsey fees which are "ordinarily based primarily on [Dorsey's] usual and customary hourly rates; and (2) ClearOne agreed to pay Dorsey's bill upon receipt.<br><br>ClearOne's remaining response to paragraph 14 are conclusory legal arguments that do not dispute the facts set forth in paragraph 14 and present theories irrelevant to this motion. *See Murdock v. Springville,* 1999 UT 39, 982 P.2d 65 (conclusory arguments do not dispute the facts).<br><br>First, ClearOne's argument that the 2004 Engagement Agreement did not incorporate the terms of the 2003 Engagement Agreement is a legal argument that ignores (1) the provision in the 2004 Engagement Agreement providing it was updating the 2003 Engagement Agreement; and (2) Mr. Keough's testimony that the 2004 Agreement was an amendment to the terms of the 2003 Agreement. *See* Plaintiffs' Memorandum, ¶ 38. Moreover, the relevant rate and use of out-of-town attorneys relates to this Court's future determination of reasonableness of the attorneys fees and costs to be awarded to Dorsey. |

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| | Marsden's rate is listed as $255 per hour – largely in line with his rate at Bendinger. The Bendinger engagement letter does not attempt to recite as a term – much less obtain ClearOne's agreement upon – the potential use of out-of-town attorneys or the fact that fees would be affected by the rates charges by out-of-town attorneys. | |
| 15. Pursuant to ClearOne's promises in the Engagement Agreements, Dorsey has represented Strohm throughout the Criminal Case. See Declaration of Milo Steven Marsden in Support of Motion for Partial Summary Judgment filed on August 12, 2009 (the "Marsden Declaration") at ¶ 11. | Response to ¶ 15:<br>Denied. Paragraph 11 of Mardsen's Aug. 12, 2009 Declaration states in full: "Dorsey represented Strohm throughout the Criminal Case, and continues to represent Strohm in connection with this matter." Plaintiffs offer no record support for their contention that such representation was pursuant to either engagement letter or that ClearOne made any promises with respect to the Criminal Case in either letter.<br><br>To the contrary, in the May 2007 E-mail exchange between Mr. Marsden and Ray Etcheverry, Mr. Marsden asked ClearOne to acknowledge that the grand jury proceeding was covered by Ms. Strohm's Employment Termination Agreement and the Dorsey engagement letter was not raised or discussed in this E-mail exchange. Pls' Br. Ex. 4. When the issue of the Dorsey engagement letter was first raised in William Michael's letter to Greg A. | It is undisputed that Dorsey represented Strohm throughout the Criminal Case.<br><br>ClearOne's self-serving statement in Mr. LeClaire's November 8, 2007, letter that the 2004 Engagement Agreement did not cover the Criminal Case does not dispute this fact. Moreover, this self-serving statement is irrelevant and lacks foundation. It is undisputed that Mr. Keough, as the CEO of ClearOne, signed both the 2003 Engagement Agreement and 2004 Engagement Agreement. Mr. Keough testified that at the time he signed the 2003 Engagement Agreement and 2004 Engagement Agreement, ClearOne understood that the relevant paragraphs defining the scope of the representation included any possible criminal proceedings against Ms. Strohm. *See* ClearOne Dep. at 33:2-20; 44:20-46:4; 111:10-112:2; 114:2-11; 117:8-118:4; 119:13-120:18; 122:3-10; 170:23-171:10; 175:12-22. |

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| | LeClaire dated November 8, 2007 (Exhibit D at page 3), ClearOne responded that "the retainer agreements governed the SEC complaint and not the current U.S. Department of Justice action." Exhibit E at page 3. | ClearOne also entered into the Joint Defense Agreement that recognizes Mr. Marsden would be representing Ms. Strohm in the DOJ Action and any future criminal proceedings. Notably, Mr. LeClaire was not involved in signing either the 2003 Engagement Agreement or the 2004 Engagement Agreement. Accordingly, his self-serving letter does not dispute Mr. Keough's testimony. *See Treloggan v. Treloggan,* 699 P.2d 747 (Utah 1985) (a declarant's unsubstantiated opinions or beliefs without personal knowledge does not contest a fact). ClearOne concedes that the only person with knowledge regarding ClearOne's understanding of the terms of the 2003 Engagement Agreement and 2004 Engagement Agreement is Mr. Keough. *See* ClearOne's Memorandum at 23. Simply put, Mr. LeClaire lacks the personal knowledge to support the self serving claims in his letter. |
| 16. ClearOne paid Dorsey's bills for services rendered in the Criminal Case for the eleven months from May of 2007 through March of 2008. See id. at ¶ 12. During this time, in its public filings ClearOne consistently acknowledged that it had a "direct financial obligation to advance funds related to the indemnification agreements with [Strohm] for any liability | Response to ¶ 16: Denied. ClearOne did not simply pay Dorsey's bills for services rendered from May 2007 through March 2008. ClearOne repeatedly attempted to obtain sufficient information about the services that were actually being rendered and expenses being incurred in order to determine what was reasonable. See, e.g., Exhibits | This fact remains undisputed. ClearOne does not dispute that it paid the bills from May 2007 through March 2008.<br><br>The statements in ClearOne's public filings are also undisputed. |

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| and for all reasonable attorney's fees and costs incurred in defending against the charges brought by the United States Attorney." 11/12/2007 Form 10-Q (for period ended Sept. 30, 2007), at 22. (A copy of this Form 10-Q is attached to the Original Complaint at Exhibit F). | D & E (annexed hereto). The parties ended up compromising their respective positions as recited in William Michael's December 13, 2007 letter to Mr. LeClaire. Exhibit F (annexed hereto).<br><br>ClearOne's SEC filings never referred to the Bendinger or Dorsey engagement letters, but rather variously stated ClearOne's evolving understanding of what it understood its obligation to be pursuant to Ms. Strohm's Employment Termination Agreement and Ms. Flood's Employment Separation Agreement – referred to in the filings as "the indemnification agreements." See, e.g., Original Complaint Ex. D ("By virtue of certain provisions of the Company's Articles of Incorporation, Bylaws and indemnification agreements with these former officers, the Company has a direct financial obligation to indemnify each former officer for any liability and for all reasonable attorney's fees and costs incurred in defending against the charges brought by the United States Attorney."). | |
| 17. However, in March of 2008 ClearOne reversed field. ClearOne ceased paying the invoices Dorsey submitted, and ClearOne has paid no subsequent invoices. See | Response to 17: Denied. Paragraph 11 of Mr. Marsden's Aug. 12, 2009 Declaration states in full: "Dorsey represented Strohm throughout the Criminal Case, and continues to represent Strohm in connection with | This fact remains undisputed. ClearOne does not dispute that it previously paid Dorsey's invoices but ceased making such payments in March of 2008 and has not paid subsequent invoices. |

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| Marsden Declaration at ¶ 11. | this matter." Plaintiffs therefore offer no record support for the contentions set forth. | |
| 18. Since that time, Dorsey has submitted invoices for its services and for costs advanced in the Criminal Case in excess of $1,000,000. | No Response. | These facts are undisputed. |
| 19. On August 21, 2008, the Plaintiffs commenced this proceeding (the "Collection Case") by filing the Original Complaint. The Plaintiffs filed an Amended Complaint on July 29, 2009. In the Collection Case, Strohm and Dorsey have asserted a variety of theories under which they are seeking to recover from ClearOne the fees and costs incurred in representing Strohm in the Criminal Case. | No Response. | These facts are undisputed. |
| 20. The Amended Complaint's Third Claim for Relief alleges that the Engagement Agreements constitute a valid and binding contract between Dorsey, Strohm, and ClearOne, and that ClearOne has breached this contract "by failing to pay Dorsey for the full amount of legal services provided to Ms. Strohm as agreed." Amended Complaint at 23 (¶ 78). | No Response. | These facts are undisputed. |
| 21. The Amended Complaint's Third Claim for Relief also alleges that under the terms of the parties' agreement (i) Dorsey is entitled to its attorney's fees incurred in this action (id., ¶ 79) and (ii) | No Response. | These facts are undisputed. |

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| Dorsey is entitled to interest on these amounts at 18% per annum (Id.). | | |
| 22. Shortly after the Original Complaint was filed, Strohm and Dorsey filed a motion seeking summary judgment on their claims related to the Engagement Agreements. See Plaintiffs' Motion for Partial Summary Judgment (dated 10/3/2008). In their motion, the Plaintiffs argued that the plain language of the Engagement Agreements required ClearOne to pay Strohm's attorney fees and costs incurred in the Criminal Case as those invoices came due, that Dorsey had provided a defense for Strohm in the Criminal Case, and that ClearOne had breached the Engagement Agreements by failing and refusing to pay any of Ms. Strohm's attorney fees and costs incurred in connection with her defense since March of 2008. See id, generally. | No Response. | These facts are undisputed. |
| 23. The Court held a hearing on the Plaintiffs' motion (and other matters) on December 19, 2008, and rejected the Plaintiffs' argument that the language of the Engagement Agreements was sufficiently plain and unambiguous in setting forth the scope of ClearOne's engagement of Dorsey to represent Ms. Strohm. See Transcript of Hearing dated December 19, 2008 (the "December 19th Transcript") at 54 (Relevant | No Response. | These facts are undisputed. |

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| portions of the December 19th Transcript are attached hereto as Exhibit 6). Instead, the Court found that it could not determine "the scope of the agreement" based solely on the plain language of the Engagement Agreements, and that discovery would be required on "the intention of the parties" with regard to this issue. Id. | | |
| 24. Similarly, last July in considering ClearOne's motion regarding this same cause of action, the Court stated that "the Letter agreements I have found them to be ambiguous. And then my first duty is to find evidence if it's available to give me the intent of the parties." July 1st Transcript at 29. The Court explained that the way to clear up the ambiguity would be to permit discovery on, among other things, the scope of ClearOne's engagement of Mr. Marsden and Dorsey under the Engagement Agreements. See id. at 55. | No Response. | These facts are undisputed. |
| 25. On March 17, 2009, the Plaintiffs noticed the deposition of ClearOne (the "Deposition Notice"). A copy of the Deposition Notice is attached hereto as Exhibit 7. Pursuant to Rule 30(b)(6) of the Utah Rules of Civil Procedure, the Deposition Notice demanded that ClearOne produce "one or more of its officers, directors, managing agents, or other persons who are | No Response. | These facts are undisputed. |

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| knowledgeable and consent to testify on ClearOne's behalf with respect to each of the subject matters listed" on an attached schedule of topics, including:<br><br>10. The circumstances surrounding your negotiation and execution of the Employment Termination Agreement, the 2003 Agreement, or the 2004 Agreement.<br><br>11. Communications you have had regarding the Employment Termination Agreement, the 2003 Agreement, or the 2004 Agreement.<br><br>Id. | | |
| 26. On August 31, 2009, counsel for ClearOne notified the Plaintiffs by e-mail that ClearOne had designated Mike Keough as its representative to testify on topics 10 and 11 with respect to the Engagement Agreements. See E-mail from Neil Capobianco dated August 31, 2009 (the "Capobianco E-mail") at 1. A copy of this e-mail is attached hereto as Exhibit 8. Mr. Keough, in addition to being ClearOne's designated corporate representative on these topics, had been ClearOne's CEO at the time the Engagement Agreements were signed, and was the person at ClearOne who actually signed the Engagement Agreements on ClearOne's behalf. See ClearOne Depo. at 89:22-24; | No Response. | These facts are undisputed. |

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| see also Engagement Letters at 3. | | |
| 27. On October 7, 2009, the Plaintiffs conducted ClearOne's deposition pursuant to Rule 30(b)(6). Mr. Keough appeared as ClearOne's representative on topics 10 and 11, as set forth above. | No Response. | These facts are undisputed. |
| 28. At its deposition, ClearOne testified that it understood, prior to executing the 2003 Engagement Agreement, that the Department of Justice was investigating Strohm and that criminal charges could be brought as a result of that investigation:<br><br>Q. And you also understood in 2002, early 2003 as the CEO of ClearOne, that a DOJ investigation was being undertaken and that could result in a criminal litigation and claims being brought against Strohm and Flood.<br><br>MR. CAPOBIANCO: Objection to form.<br><br>Q. Is that right?<br><br>A. Yes.<br><br>Q. And those criminal claims that could be brought against Strohm and Flood would relate to or arise out of the SEC action, correct?<br><br>MR. CAPOBIANCO: Objection to form.<br><br>Q. The same underlying | Response to ¶ 28: Denied. These questions are improperly leading, hypothetical, and outside the scope of the deposition topics on which Mr. Keough was designated to testify and therefore, the cited testimony is inadmissible. Mr. Keough recalls only that someone told him that Steve Marsden would be representing Susie Strohm (Keough Dep. 143:7-144:5), recalls no discussion by ClearOne's Board regarding the scope of Mr. Marsden's retention (Keough Dep. 45:14-19), recalls no Board review of the Bendinger engagement letter (Keough Dep. 119:6-12), and did not know whether Mr. Marsden had any experience handling criminal matters when he [Mr. Keough] signed the engagement letters (Keough Dep. 141:7-13). Moreover, Mr. Keough harbors animus against ClearOne since he was involuntarily relieved as ClearOne's CEO by ClearOne's Chairman in June 2004 because of unspecified allegations from Mr. Keough's former | These facts are undisputed.<br><br>The testimony of Mr. Keough remains undisputed and is admissible for several reasons.<br><br>First, ClearOne's claim that the questions are improperly leading lacks merit for several reasons. Mr. Keough was designated at ClearOne's 30(b)(6) witness regarding the circumstances surrounding the negotiations and execution of the 2003 Engagement Agreement and 2004 Engagement Agreement. The existence and ClearOne's knowledge of the DOJ investigation of Strohm is a circumstance surrounding the negotiation and execution of the Engagement Agreements. Rule 611(c) of the Utah Rules of Evidence states leading questions are permitted when a party calls an adverse party or a witness identified with an adverse party. Mr. Keough, as ClearOne's 30(b)(6) representative, is testifying on behalf of the adverse party – ClearOne. Accordingly, the alleged leading questions were proper and permitted. |

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| claims?<br><br>A. Yes.<br><br>Q. And that was your knowledge and understanding as the CEO in December of 2002 when you were interim CEO, and early January of 2003; is that right?<br><br>A. Yes.<br><br>ClearOne Depo., at 33:2-20. | administrative assistant (Keough Dep. 27:11-28:12). | Second, these questions merely summarized Mr. Keough's prior testimony.<br><br>Q. In the 2004 10-K it states that the SEC action was filed on January 15, 2003.<br><br>A. Ok.<br><br>Q. So if that's the date that it was filed, when you took over for Ms. Flood as the interim CEO in December you were at least aware there was an investigation at the time ongoing ..<br><br>A. Yes.<br><br>Q. – into those alleged improper revenue recognition issues?<br><br>A. Yes.<br><br>Q. And these allegations, as you understood it, involved allegations of involvement by Fran Flood and Susie Strohm?<br><br>A. Yes.<br><br>ClearOne Dep., 26:14-27:3<br><br>Q. Okay. With respect to – we have gone over the SEC action and the shareholder class action. There was a third one called Department of Justice Investigation of Flood and Strohm [Referencing the June 2003 Clear One 10-k]. Do you recall that?<br><br>A. I recall a Department of Justice investigation, but – |

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| | | yes.<br><br>Q. And what is your understanding of what a Department of Justice investigation, what the purpose is of –<br><br>A. I can't tell you I know exactly, but at the time I was aware that the SEC was a civil action and the Department of Justice could potentially be more on the criminal side.<br><br>Q. Okay. So the SEC action that was filed in January 15, 2003, that was the civil piece of litigation?<br><br>A. Uh-huh (Affirmative)<br><br>Q. And if I understand what you've told me is that you had an understanding as the CEO of ClearOne that a DOJ Investigation is the criminal side, and that's an investigation that could ultimately lead to criminal claims against Strohm and Flood, is that correct?<br><br>A. Yes.<br><br>Mr. Capobianco: Objection Form.<br><br>Q. And this criminal investigation, the DOJ investigation, was it also your understanding as CEO that that investigation was related to and arose out of the revenue recognition issue that we talked about in the SEC action? |

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| | | A. Yes.<br><br>ClearOne did not object to Mr. Keough's prior testimony. As a result, it waived any objection to the question an answers of its 30(b)(6) witness. *See* Utah R. Civ. Proc. 32(c)(3)(B). Keough subsequently testified, without objection as follows:<br><br>Q. Ok. And did you understand in 2002 and early 2003 that Mr. Marsden would be representing Fran in both –<br><br>Mr. Marsden: Susie<br><br>Q. Susie Strohm both in connection with the SEC action and the DOJ investigation?<br><br>A. Yes. He was the only legal counsel I was ever aware of that represented Susie on any of this.<br><br>ClearOne Dep. 43:4-11<br><br>Mr. Keough testified as follows concerning the scope of the 2003 Engagement Agreement:<br><br>Q. And what was your understanding as to what the term "further related investigations and litigation" meant?<br><br>A. It was early on and I don't think anybody knew what would spawn from that. But effectively as the CFO of the Company, she was going to be |

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| | | indemnified.<br><br>Q. Prior to signing this on January 29, 2003 you understood that there was a DOJ Investigation, right?<br><br>A. That was part of what was going on, yes.<br><br>ClearOne Dep. 113:8-18<br><br>Q. And did you understand where it says "further related investigations and litigation," with your understanding there was a DOJ investigation going on, that the term, "in connection with further related investigation and litigation," would include if it happened, a criminal indictment and criminal action against Ms. Strohm?<br><br>Mr. Capobianco: Objection to form.<br><br>A. That would have been my understanding.<br><br>ClearOne Dep. 114:2-11.<br><br>Finally, ClearOne's contention that Mr. Keough's testimony is improper and inadmissible because he is allegedly biased fails for several reasons. A Court does not weigh the credibility of a witness on a motion for summary judgment. *Sandberg v. Klein,* 576 P.2d 1291 (Utah 1978). Moreover, Mr. Keough was designated by ClearOne as its 30(b)(6) witness to testify on its behalf. ClearOne is not |

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| | | entitled to excluded Mr. Keough's testimony because it failed to prepare its witness and does not like the testimony of its 30(b)(6) designee. In addition, the testimony cited by ClearOne does not contest the fact that ClearOne was aware of the DOJ investigation prior to entering into the 2003 Engagement Agreement. Rather, the testimony establishes that Mr. Keough is the sole witness who can testify regarding the circumstances and understanding of ClearOne regarding the scope of the 2003 Engagement Agreement and 2004 Engagement Agreement. |
| 29. ClearOne further testified that it understood the scope of Mr. Marsden's representation of Ms. Strohm under the 2003 Engagement Agreement included representation of her in any criminal case that might be brought, and that there was no discussion regarding a limitation on the scope of his representation:<br><br>Q. And as I understand it, what you were telling me is that when [Mr. Marsden] was retained you understood, as the CEO of ClearOne, the scope of Mr. Marsden's representation was going to be representing Ms. Strohm in the SEC action, right?<br><br>A. Yes. | Response to ¶ 29: Denied. See Response to ¶ 28. | These facts are undisputed.<br><br>ClearOne has not presented any admissible evidence disputing the testimony of Mr. Keough. *See* Reconciliation to ClearOne's response to ¶ 28. |

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| Q. He would represent her in the DOJ investigation?<br><br>A. Yes.<br><br>Q. And as you have told me, any and all other claims that might be brought against her, including any criminal indictments or criminal actions brought against her?<br><br>A. Yes.<br><br>Q. That was your understanding of what his retention was when ClearOne approved Mr. Marsden to be retained to represent Susi Strohm?<br><br>A. Yes.<br><br>MR. CAPOBIANCO: Objection to form.<br><br>Q. Do you recall any discussion by any of the board members with respect to the scope of Mr. Marsden's retention?<br><br>A. "Scope" meaning? Any limit on scope?<br><br>Q. What it was limited to.<br><br>A. No.<br><br>Q. And as the 30(b)(6) designee on behalf of ClearOne, is it your testimony you don't recall any other discussions or communications by any board member limiting the scope of Mr. Marsden's representation? | | |

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| A. No limitation of scope.<br><br>Q. Then there was no discussion or agreement that his representation be limited solely to the SEC action?<br><br>A. No discussion about that.<br><br>ClearOne Depo., at 44:20-46:4 (emphasis added). | | |
| 30. Indeed, contrary to the representations ClearOne's counsel has made to this Court, ClearOne testified that not only did it not intend the Engagement Agreements to be limited solely to the SEC Action, it expected Mr. Marsden would represent Ms. Strohm in any criminal action:<br><br>Q. And after reading the retainer agreement, did you think that Mr. Marsden's scope of his retention in representing Ms. Strohm was limited solely to the SEC action?<br><br>A. No.<br><br>Q. Did you have the understanding at that time that based on the DOJ action, his scope of representation would be expanded beyond civil litigation to include representing her in criminal actions that related to or were in connection with base allegations of revenue recognition in the SEC civil complaint?<br><br>MR. CAPOBIANCO: Objection to form. | Response to ¶ 30:<br>Denied. See Response to 1128. Moreover, Mr. Keough's responses to the effect that something "would have been [his] expectation" lacks proper foundation and is inadmissible because such testimony indicates that he does not recall what his understanding was at the time he signed the engagement letters – or whether he even had an understanding – and that he was attempting to project counsel's current conclusion onto his speculation as what "he would have" thought at the time. | These facts are undisputed.<br><br>ClearOne has not presented any admissible evidence disputing the testimony of Mr. Keough. *See* Reconciliation to ClearOne's response to ¶ 28.<br><br>Mr. Keough testified he signed the 2003 Engagement Agreement and 2004 Engagement Agreement as the CEO of ClearOne. ClearOne Dep. 120:12-18; 124:1-3. He testified he reviewed the agreement before signing them on behalf of ClearOne. ClearOne Dep. 109:5-8; 162:8-19/ ClearOne has failed to identify how Mr. Keough would not have personal knowledge and the necessary foundation to testify regarding his understanding of the terms of the agreements that he signed in his official capacity as the CEO of ClearOne. Moreover, Mr. Keough testified that that was his understanding at the time. *See* ClearOne Dep. at 108:9-109:8 |

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| A. Yes. That would have been my expectation.<br><br>Q. And that was your understanding?<br><br>A. Yeah. He was the only counsel referenced working on Susie's behalf for whatever the issue was.<br><br>Q. And as I understand it, as the CEO of ClearOne you understood that the scope of his representation was not just limited to civil litigation.<br><br>A. That's correct.<br><br>ClearOne Depo., at 117:8-118:4. | | |
| 31. ClearOne repcatedly confirmed that the 2003 Engagement Agreement was intended to cover the defense of Strohm should any criminal indictments be brought against her:<br><br>Q. Thank you. And in the first paragraph – before we get there, if I remember correctly, and I just want to confirm, you stated earlier that it was your understanding, at the time that Mr. Marsden was retained and that you signed [the 2003 Engagement Agreement] on behalf of ClearOne, that the scope of his retention would be the SEC action?<br><br>A. Yes.<br><br>Q. It would include the DOJ action. | Response to ¶ 31: Denied. See Response to ¶ 28. | These facts are undisputed.<br><br>ClearOne has not presented any admissible evidence disputing the testimony of Mr. Keough. *See* Reconciliation to ClearOne's response to ¶ 28. |

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| MR. CAPOBIANCO: Objection to form.<br><br>Q. Is that correct?<br><br>A. Yes.<br><br>Q. And if I understand you, and you tell me if I'm wrong, it would include any criminal indictments; defending against those with respect to Ms. Strohm?<br><br>MR. CAPOBIANCO: Objection to form.<br><br>A. Yes. Nothing was excluded, as I remember.<br><br>ClearOne Depo., at 111:10-112:2; see also id. at 170:23-171:10. | | |
| 32. Indeed, ClearOne specifically confirmed that it understood the phrase "further related investigations and litigation," as contained in the 2003 Engagement Agreement, to include any criminal indictments and criminal actions against Strohm:<br><br>Q. And did you understand where it says "further related investigations and litigation," with your understanding that there was a DOJ investigation going, that that term, "in connection with further related investigations and litigation," would include, if it happened, a criminal indictment and criminal action against Ms. Strohm?<br><br>MR. CAPOBIANCO: | Response to ¶ 32:<br>Denied. See Response to ¶ 30. | These facts are undisputed.<br><br>ClearOne has not presented any admissible evidence disputing these acts. *See* Reconciliation to ClearOne's response to ¶ 28. |

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| Objection to form.<br><br>A. That would have been my understanding, yes.<br><br>ClearOne Depo., at 114:2-11. | | |
| 33. ClearOne also testified that it understood that, under the 2004 Engagement Agreement, Dorsey had been engaged to represent Strohm in potential criminal actions, and that it expected that such criminal action would be brought against Strohm:<br><br>Q. So you understood that there were still potential indictments that could come down and criminal action brought against Ms. Strohm when you signed [the 2004 Engagement Agreement], correct?<br><br>A. Yes. In fact, that was my expectation.<br><br>Q. And you understood, based on that expectation, that was still the scope of Mr. Marsden's representation under [the Engagement Agreements], correct?<br><br>A. Yes. There were no limits ever decided on that representation.<br><br>ClearOne Depo., at 175:12-22. | Response to ¶ 33: Denied. See Response to ¶ 28. Moreover, Mr. Keough has no specific recollection of discussing the Dorsey engagement letter with anyone (Keough Dep. 162:13- 15). By signing the Dorsey engagement letter, Mr. Keough did not intend to give any rights to Susie Strohm in addition to what she received in her Employment Termination Agreement (Keough Dep. 164:10-15). In fact, Mr. Keough was surprised when Ms. Strohm was ultimately indicted (Keough Dep. 176:3-9).<br><br>Furthermore, by the Fall of 2003, ClearOne did not believe that there was a reasonable possibility of a criminal proceeding being brought and did not believe that any indictment of Susie Strohm was in the realm of possibilities. Gross Dep. 43:14-44:20. ClearOne had made a decision to' file a lawsuit against ClearOne's Directors and Officers liability carriers and would not have done so if it thought that there was a reasonable possibility of a criminal proceeding. Gross Dep. | These facts are undisputed.<br><br>ClearOne has not presented any admissible evidence disputing the testimony of Mr. Keough. *See* Reconciliation to ClearOne's response to ¶ 28.<br><br>The fact Mr. Keough did not discuss the terms of the Engagement Agreements with anyone at ClearOne further establishes that he is the only person on behalf of ClearOne who can testify regarding ClearOne's understanding of the scope of the agreements.<br><br>Mr. Keough testified that he understood the ETA obligated ClearOne to pay Strohm's legal fees in the criminal action as billed by Marsden. *See* ClearOne Dep. at 67:20:-72:12; 73:23-74:19. Accordingly, his testimony regarding the rights granted under the ETA and engagement agreements is consistent.<br><br>*See also* Reconciliation to ClearOne's response to ¶ 4. |

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| | 44:12- 20. | |
| 34. ClearOne testified that it, rather than Strohm, would be obligated under the Engagement Agreements to pay invoices submitted by Dorsey:<br><br>Q. So when you say that, was it your understanding that if Ms. Strohm didn't pay the bills of Mr. Marsden for representing Ms. Strohm, ClearOne was obligated to pay them?<br><br>MR. CAPOBIANCO: Objection to form.<br><br>A. Yes. I don't remember any conversation about Ms. Strohm paying the bills.<br><br>ClearOne Depo., at 122:23-123:4. | Response to ¶ 34: Denied. See Response to ¶ 28. The fact that Mr. Keough does not recall any discussions about Ms. Strohm paying Dorsey's invoices does not establish that ClearOne was acknowledging any obligation to pay Dorsey's invoices in connection with the federal criminal proceeding, much less that any such obligation existed pursuant to the engagement letters. | These facts are undisputed.<br><br>ClearOne has not presented any admissible evidence disputing the testimony of Mr. Keough. *See* Reconciliation to ClearOne's response to ¶ 28. |
| 35. ClearOne also confirmed that, as stated in the 2003 Engagement Agreement, it agreed to pay Dorsey's invoices within 30 days of receipt of any such invoice:<br><br>Q. Did ClearOne agree to pay invoices from Mr. Marsden for the services he rendered in representing Ms. Strohm as they were billed within 30 days after receipt?<br><br>A. Did they actually do that or is - -<br><br>Q. Is that what they agreed to?<br><br>A. Yes. | Response to ¶ 35: Denied. See Response to ¶ 28. The cited testimony refers to the Bendinger engagement letter, not to the Dorsey engagement letter, which was not introduced until page 123. Moreover, this testimony is inadmissible because Mr. Keough – a lay witness – is not competent to testify as to the proper legal interpretation of the Bendinger engagement letter. | These facts are undisputed.<br><br>ClearOne has not presented any admissible evidence disputing the testimony of Mr. Keough. *See* Reconciliation to ClearOne's response to ¶ 28.<br><br>Moreover, Plaintiffs' Statement of Fact No. 39 establishes ClearOne understood that the 2004 Engagement Agreement merely updated and amended certain terms of the 2003 Engagement Agreement and that the two agreements constituted one agreement. |

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| ClearOne Depo., at 110:9-15. | | |
| 36. With respect to interest on unpaid invoices, ClearOne testified that it understood, under the Engagement Agreements, Dorsey would be entitled to receive 18% interest per annum on any invoice not paid within 30 days of receipt:<br><br>Q. And did ClearOne also agree that any amount unpaid after the 30 days would bear and accrue interest at a rate of 18 percent?<br><br>A. If that was in the original draft as it is here, yes.<br><br>Q. Okay. And is that your understanding of paragraph 3, the second paragraph where it says, "Any amount billed and unpaid after such thirty day period shall bear and accrue interest at the rate of 18 percent per annum for the date billed until paid?"<br><br>A. Yes.<br><br>ClearOne Depo., at 110:16-111:1. | Response to ¶ 36: Denied. See Response to ¶ 35. | These facts are undisputed.<br><br>ClearOne has not presented any admissible evidence disputing the testimony of Mr. Keough. *See* Reconciliation to ClearOne's response to ¶ 28.<br><br>Moreover, Plaintiffs' Statement of Fact No. 38 establishes ClearOne understood that the 2004 Engagement Agreement merely updated and amended certain terms of the 2003 Engagement Agreement and that the two agreements constituted one agreement. |
| 37. In addition, ClearOne confirmed that it understood it would be obligated to pay for Dorsey's attorney's fees in the event that Dorsey was required to bring an action to collect its fees under the Engagement Agreements:<br><br>Q. And if they weren't paid and Mr. Marsden had to bring an action to recover his fees | Response to ¶ 37: Denied. See Response to ¶ 35. | These facts are undisputed.<br><br>ClearOne has not presented any admissible evidence disputing the testimony of Mr. Keough. *See* Reconciliation to ClearOne's response to ¶ 28.<br><br>Moreover, Plaintiffs' Statement of Fact No. 38 establishes ClearOne |

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| from ClearOne, was it your understanding ClearOne would pay his fees and costs in enforcing the terms of the retainer agreement?<br><br>A. If they were found to be - -<br><br>Q. Successful?<br><br>A. Yes.<br><br>Q. Okay. So if ClearOne just decides they are not going to pay –<br><br>A. Yes.<br><br>Q. - - and they ultimately are found that they weren't entitled to stop paying, it was your understanding that Mr. Marsden would recover all of his reasonable attorney's fees and costs in getting a judgment to get the money for his attorney's fees and costs from ClearOne?<br><br>MR. CAPOBIANCO: Objection to form.<br><br>Q. Is that your understanding?<br><br>A. Yes.<br><br>ClearOne Depo., at 116:9-117:3. | | understood that the 2004 Engagement Agreement merely updated and amended certain terms of the 2003 Engagement Agreement and that the two agreements constituted one agreement. |
| 38. Finally, ClearOne testified that it understood the 2004 Engagement Agreement updated the parties' agreement to reflect Mr. Marsden's move to Dorsey, but that other terms of the 2003 Engagement Agreement remained in place: | Response to ¶ 38: Denied. See Response to ¶ 28. Moreover, Mr. Keough's response lacks proper foundation and is inadmissible because his testimony that something "would have been [his] expectation" indicates that he | These facts are undisputed.<br><br>ClearOne has not presented any admissible evidence disputing the testimony of Mr. Keough. *See* Reconciliation to ClearOne's response to ¶ 28. |

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| Q. Okay. Let me have you look at the first paragraph [of the 2004 Engagement Agreement] where Mr. Marsden says, "As you know, I recently left the law firm of Bendinger, Crockett, Peterson & Casey, and joined the law firm of Dorsey & Whitney, LLP." That's pretty basic.<br><br>A. Yes.<br><br>Q. And the next section says, "Our engagement agreement needs to be updated to reflect this move."<br><br>A. Uh-huh (affirmative).<br><br>Q. What did you understand him to mean when he was referencing "our engagement agreement"?<br><br>A. Well, other than the change of firms, nothing else changed. It was –<br><br>* * * *<br><br>Q. So when Mr. Marsden is stating in the first paragraph in [the 2004 Engagement Agreement], where he says, "The rest of this letter is intended to serve as the update," did you understand that the purpose of [the 2004 Engagement Agreement] was to sort of amend or update certain terms of Exhibit 9 and leave the rest unchanged?<br><br>A. Yes.<br><br>* * * * | does not recall what his understanding was at the time he signed the Dorsey engagement letter – or whether he even had an understanding – and that he was attempting to project counsel's current conclusion onto his speculation as what "he would have" thought at the time. This testimony is also inadmissible because Mr. Keough – a lay witness – is not competent to testify as to the proper legal interpretation of the Dorsey engagement letter.<br><br>Furthermore, by signing the Dorsey engagement letter, Mr. Keough did not intend to give any rights to Ms. Strohm in addition to what she received in her Employment Termination Agreement (Keough Dep. 164:10-15). | Mr. Keough testified he signed the 2003 Engagement Agreement and 2004 Engagement Agreement as the CEO of ClearOne. ClearOne Depo. at 108:23-109:8. He testified he reviewed the agreement before signing them on behalf of ClearOne. *Id.* ClearOne has failed to identify how Mr. Keough would not have either the personal knowledge necessary to testify regarding his understanding of the terms of the agreements that he signed in his official capacity as the CEO of ClearOne. Moreover, Mr. Keough testified regarding his understanding at the time he signed the agreements.<br><br>This Court has ruled that the engagement agreements are ambiguous. The testimony of Mr. Keough, the person who signed each agreement on behalf of ClearOne, is the quintessential extrinsic evidence a Court examines when determining the intent of contracting parties. In contrast, ClearOne's legal arguments do not create an issue of fact or extrinsic evidence.<br><br>Mr. Keough testified as follows regarding the 2004 Engagement Agreement, without any objection by ClearOne:<br><br>Q. Okay. And so I want to make sure one last time that I understand. As ClearOne's |

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| Q. I'll rephrase it. Did you then consider [the 2003 Engagement Agreement] and [the 2004 Engagement Agreement] to be essentially combined as one agreement, with [the 2004 Engagement Agreement] merely updating [the 2003 Engagement Agreement]?<br><br>A. Yes. I think "update" is the correct word.<br><br>* * * *<br><br>Q. Okay. And so terms that were not changed or modified in [the 2004 Engagement Agreement] would remain terms in [the 2003 Engagement Agreement] that ClearOne agreed to, going forward still with Mr. Marsden representing Susie Strohm. Would that be fair?<br><br>MR. CAPOBIANCO: Objection to form.<br><br>A. That would have been my expectation, yes.<br><br>Q. And was that your understanding as the CEO of ClearOne?<br><br>A. It was.<br><br>Q. And as the 30(b)(6) designee of ClearOne, was that the understanding of ClearOne?<br><br>MR. CAPOBIANCO: Objection.<br><br>A. I knew of no other | | representative here testifying about Exhibits 10 [2004 Engagement Agreement] and Exhibit 9 [2003 Engagement Agreement], and having signed it as ClearOne's CEO for ClearOne, both Exhibits 9 and 10, you considered both Exhibits 9 and 10 to be combined as one agreement?<br><br>A. Yes.<br><br>Q. Exhibit 10 was merely an amendment or update to some of the terms in Exhibit 9?<br><br>A. Yes.<br><br>ClearOne Depo. at 131:22-132:6 |

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| understanding. So I would say yes.<br><br>ClearOne Depo., at 124-127. | | |

# EXHIBIT 2

COPY

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

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| SUSIE STROHM and DORSEY & WHITNEY, LLP,<br><br>Plaintiffs,<br><br>vs.<br><br>CLEARONE COMMUNICATIONS, INC.,<br><br>Defendant. | Case No. 080917500<br><br>Judge: Robert Hilder |

**VIDEOTAPE DEPOSITION OF: MILO STEVEN MARSDEN**

**OCTOBER 14, 2009**

**9:03 A.M. TO 5:40 P.M.**

Location: LAW OFFICES OF MAGLEBY & GREENWOOD
170 South Main Street, Suite 350
Salt Lake City, Utah

Reporter: Judy A. Holdeman, RPR, CSR
Notary Public in and for the State of Utah

**CD ENCLOSED**

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801.484.2929 reporting@QAreport.com

A. Um -- well, I'm sure it came up with Fran Flood. Or it was implicit because she was there -- uh -- probably implicit in the meetings where Dal Bagley was present and where Brad Baldwin is present. But as far as a discussion particularly on that topic -- uh -- I don't remember anybody else.

Q. Did you ever speak to any ClearOne attorney other than Scott Hunter about the fact that you were going to be representing Ms. Strohm?

A. Yes.

Q. Who?

A. Neil Kaplan, Rod Snow, Jennifer James -- uh -- who else did they have on their team? They had Walt Romney.

Q. Now, do you know how it is that you ended up representing Susie Strohm instead of Fran Flood?

A. Yes.

Q. How is that?

A. We had some -- I had participated in discussions where we were trying to align what I, again, will call the defense team. And I don't know whether I suggested it. My memory is I suggested it that it -- it would be -- uh -- more appropriate to have Max represent the CEO and more appropriate to have me with my securities and financial professional background represent Susie.

Q. And what was -- what was your understanding at

that time of Max's, you know, area of expertise?

A. Max is a highly visible criminal law specialist. He does commercial work, and he does securities work as well. But he was -- he's known in the community as a criminal lawyer.

Q. Okay. And in 2003, were you known in the community as a criminal lawyer?

A. No, I did not hold myself out as a criminal specialist. As I said, I am a securities fraud -- uh -- civil fraud specialist.

Q. And how many attorneys were there at Bendinger Crockett in 2003?

A. Uh -- we varied over the course of my career there between 15 and 20 -- 22 so. . .

Q. And you described it as a litigation boutique?

A. Yes.

Q. Were there only security litigators at Bendinger?

A. We had antitrust lawyers. And I say it's -- it's not fair to pigeonhole us as just securities litigators. We were, you know, utility infielders. We were litigation specialists.

Q. Everyone in the firm was a litigation specialist?

A. Everyone was a litigation specialist.

Q. Did anyone at the firm handle white-collar criminal cases?

A. Well, we -- we started out in securities fraud. In this time frame, it was hard to practice in the securities fraud world without having white-collar involvement. We're at -- with -- with -- Enron and WorldCom and following the Sarbanes-Oxley's passage and effectiveness in, I want to say, mid-2002, it was hard to find a securities fraud case where there wasn't a criminal aspect to it.

Q. So let me ask you in January of 2003, was there anyone at Bendinger Crockett who was handling a white-collar criminal case?

A. I don't know.

Q. Were you?

A. In what time frame?

Q. January of 2003.

A. Well, this case.

Q. Well, other than this case.

A. Other than this case -- uh -- no, I don't -- I -- what I was doing immediately prior to this case was -- uh -- I was not handling a white-collar case because I was up to my ears in a commercial dispute involving Salt Lake newspapers.

Q. Well, at any point in your career up until January of 2003, had you handled a white-collar criminal case?

A. Uh -- I guess I -- I don't want to stumble over your question with "handle." But I had been involved in white-collar cases. But as I said, I had not held myself out as a white-collar specialist.

Q. Okay. Had anyone, to your knowledge, at Bendinger Crockett held themselves out as a white-collar criminal specialist?

A. No. We were securities fraud and civil fraud and antitrust specialists. And to the extent that those matters ended up having criminal aspects to them, we would handle the criminal aspects.

Q. Okay. What were the SEC complaint allegations against Susie Strohm?

A. Well, it's a 20- or 30-page complaint. But broadly, the allegations related to the company's practices with regard to revenue recognition in -- for its financial statements for the years -- well, the SEC complaint actually focused on a little bit broader period, as early as -- if memory serves -- March 31 of 2001. But they were primarily focused on their public reports for the period June 30, 2001, through September 30, 2002.

Q. And what, to your recollection, was -- were the allegations against Susie Strohm in the SEC complaint?

A. That -- that -- I'm sorry, I didn't -- I thought I just answered that.

it shortly thereafter because I heard from Rod Snow.

Q. Okay. I would like you to turn to Exhibit-40 in the book. This is a 10-K filing for the fiscal year ending June 30, 2004. If you could turn -- this is just excerpts of that document. If you could turn to Page 170 of 193 in the upper right-hand corner.

A. Okay. I'm there.

Q. Okay. You see where it says "US Attorney's investigation"?

A. Yes.

Q. And it states that on January 28, 2003, the company was advised that the US Attorney's Office for the District of Utah had begun an investigation stemming from the complaint in the SEC action described above.

A. I see that.

Q. Okay. Is this something that you're relying on to conclude that you learned about the grand jury investigation in January of 2003?

A. No. I mean, it confirms that they did, but I'm relying on my memory that we had those discussions in January of 2003.

Q. And if you had those discussions, would it be in your billing statements?

A. I don't know.

Q. Okay. What did Bendinger do in connection with

the pending grand jury investigation?

**A.** We -- it was a grand jury investigation, and we had not received a subpoena. So most of the work that we were doing in the SEC action was relevant -- was the kind of work that we could do relevant to the grand jury.

In addition, I know that Rod corresponded with -- Rod Snow corresponded with me and with Max Wheeler and sought input and advice in responding to the -- to the grand jury's subpoenas.

Mostly -- well -- I'm sorry.

**Q.** Do you recall specific emphasis on which he was seeking your advice?

**A.** Specific emphasis?

**Q.** Yeah, I mean, what was he seeking your advice on?

**A.** I remember he -- he wanted -- there may be more than this. I remember seeing a letter where he had gotten a new list of priorities from the AUSA who was handling the matter. And he wanted to talk about how to address their priorities.

**Q.** And who was the AUSA that was handling the matter at that time?

**A.** I understood it to be a woman named Elizabethanne Stevens.

**Q.** Okay. So aside from responding to Rod Snow's request for input and advice on responding to the grand

A. No.
Q. You were handling another matter?
A. Yes.
Q. And were you trial counsel for that other white-collar criminal matter?
A. Yes.
Q. Okay. And to your knowledge, did any of the other attorneys in Dorsey's Salt Lake City office have any white-collar criminal defense trial experience?
A. I don't think so.
Q. And let me ask the same question with respect to the other attorneys at the Bendinger firm. Did any of the attorneys there have any white-collar criminal defense trial experience?
A. Uh -- I don't know.
Q. Not to your knowledge?
A. I don't know. They -- I mean --
Q. At the time you switched from Bendinger to Dorsey, how many white-collar criminal defense trials had you handled?
A. None.
Q. Okay. But you said there was one that you were handling at the time of the switch?
A. At the time or shortly after, there was a new white-collar -- what would be white-collar matter.

okay, let's look at the first question, "Clients you expect to bring."

A. Yes.

Q. Okay. And you have several redacted parts of this piece?

A. Right.

Q. So can we agree that what's redacted doesn't relate to Susie Strohm or ClearOne?

A. That was the intention.

Q. Okay. So on Page 2, you have a chart that lists Susie Strohm -- Strohm as a client you intend to bring; right?

A. Right.

Q. So did you list on this document the matters which were pending as of January 5, 2004, with respect to Susie Strohm?

A. I listed the filed -- I think I listed the filed matters.

Q. Okay. So you listed the SEC v. ClearOne matter?

A. Yes.

Q. Which was still then pending?

A. You know, maybe -- well -- I don't know when the final order was entered with respect to Susie.

Q. Now, when did you complete this form?

A. I -- I'm sorry, I don't know.

form, is it?

A. The department of justice investigation is not listed on the form.

Q. Okay. So, therefore, you did not view the department of justice investigation as pending when you joined Dorsey, did you?

A. No, I -- that's not correct. I -- I did not view -- the purpose of the form is to clear conflicts. I didn't know the status of the department of justice investigation. But I did not understand the department of justice investigation in whatever status it was in would present a conflict problem.

Q. Well, is there an adverse party in connection with the department of justice investigation?

A. The United States.

Q. So when it asks you to identify adverse parties in the files on which you are currently representing these clients, shouldn't you be disclosing that that's a file on which you're currently representing a client if in fact it was then pending?

A. I don't think so.

Q. Isn't it true, Mr. Marsden, that you and the other people who constituted the defense team in the SEC action did not view the department of justice investigation as pending at the time you switched to Dorsey?

MR. SHAHEEN: Objection. Calls for speculation.

A. I can answer as to myself. No, I viewed the department of justice investigation as pending.

Q. Okay. When was the last time you heard that the department of justice was doing anything in connection with the investigation?

A. Between when and when? Well, Stu Walz called me and told me that my client was going to be indicted.

Q. I'm talking about January 5, 2004, when was the last time prior to that that you had heard that the department of justice was doing anything in connection with the investigation?

A. I -- I don't know. As I testified earlier, I think I discussed it with Ray Etcheverry in the summer or fall of 2003.

Q. And the discussion at that time was that the company had completed its document production and had not heard anything further from the department of justice?

A. The discussion was -- I mean, I have testified about this already. The -- the -- the substance of the discussion was me inquiring what he knew. And -- and I remember the document production either being complete or being nearly complete and him having not heard a lot about interviews or other activity. But I did not hear the department of justice investigation is over.

Q. Mr. Marsden, when did you first reach out to a criminal defense attorney at Dorsey in connection with Ms. Strohm?

A. I don't know.

Q. Did you believe after the end of 2006 that Ms. Strohm would be criminally charged in connection with the revenue enhancement scheme?

MR. SHAHEEN: Objection. Attorney-work product.

Q. How did you first learn that Ms. Strohm might actually be criminally charged?

A. Might be criminally charged?

Q. Yeah.

A. I --

MR. SHAHEEN: Are you -- objection asked and answered. Go ahead.

A. I think I formed that judgment -- well, can you read the question back?

Q. I will restate it. How did you first learn that Ms. Strohm might actually be criminally charged?

MR. SHAHEEN: Objection. Vague.

A. Uh -- the SEC filed -- started an investigation.

Q. And that occurred when?

A. Late 2002.

Q. Okay. And -- well, what, if anything, happened after your arrival at Dorsey that lead you to believe that

Ms. Strohm might actually be criminally charged?

A. Uh -- after I arrived at Dorsey? Well, the principal thing -- I don't know that it's the only thing -- but the principal thing is I got a call from Stu Walz, an Assistant US Attorney for the District of Utah.

Q. Okay. And what did Mr. Walz tell you?

A. He said that Susie was the -- was a -- was a target and wanted to know if we wanted to come in and talk.

Q. Okay. And when was that?

A. I'm not sure of the precise date. It's in May of 2007, I think, April, May of 2007.

Q. And did he identify any other targets?

A. I don't remember that he did.

Q. Did you know Mr. Walz prior to this call?

A. I did.

Q. Okay. Had you dealt with him previously in connection with Ms. Strohm?

A. No.

Q. But he was calling you because he knew that you were Ms. Strohm's attorney?

A. That's correct or at least that's what he said.

Q. Now, what, if any, work did you perform after learning of the possibility of a criminal charge?

A. During what period of time?

Q. Well, after learning of the possibility -- after

that he was ever transferred for elsewhere. I know that he has taught at whatever the justice department school is for periods of time.

Q. Where is that located?

A. I don't know.

Q. Did Ms. Strohm have to appear before the grand jury?

A. Ms. Strohm was not asked to appear before the grand jury.

Q. Did she receive any subpoenas?

A. No.

Q. Now, to the best of your recollection, what work did any other attorneys in the Salt Lake office of Dorsey perform prior to the July 25, '07, indictment of Ms. Strohm?

A. I don't -- I don't know.

Q. How was it decided at Dorsey how the Strohm case would be staffed?

A. I think Bill and I discussed staffing and what made sense.

Q. And who was the billing attorney on the Strohm criminal --

A. I was the billing attorney, am the billing attorney.

Q. Who sent the bills to the client?

A. I think the -- well, I think that changed over

# EXHIBIT 3

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

SALT LAKE CITY DEPARTMENT

| | |
|---|---|
| SUSIE STROHM and DORSEY & WHITNEY, LLP,<br><br>Plaintiffs,<br><br>vs.<br><br>CLEARONE COMMUNICATIONS, INC.,,<br><br>Defendant. | Deposition of:<br><br>**MICHAEL KEOUGH**<br><br>Case No. 080917500<br><br>Hon. Denise P. Lindberg |

**October 7, 2009 * 9:30 a.m.**

Location: Dorsey & Whitney
136 South Main Street, Suite 1000
Salt Lake City, Utah 84101

Reporter: Diana Kent, RPR, CRR
Notary Public in and for the State of Utah

Q. So if there's objections to the form of the question, you can just kind of ignore that, that's the attorney thing, and go ahead and answer the question, okay?

A. Okay.

Q. Any questions about the procedure?

A. No.

Q. Great. Okay. Were you aware that you've been designated as what is called a 30(b)(6) witness for ClearOne?

A. No.

Q. You have never been contacted by Neil or any attorney for ClearOne indicating that you were designated as a 30(b)(6) designee?

A. I don't know what a 30(b)(6) designee means. I was contacted by both the district attorney and ClearOne, their counsel, prior to the criminal trial recently, in the last year. But I don't know what that designation means.

Q. Prior to today's deposition, have you had any contact or discussions with Neil?

A. Yes.

Q. Okay. And when did those take place?

A. Last night. And then I think we talked once or twice before, many months ago when this was

percolating. About the same time I came in to talk to Steve last.

Q. Okay. Last night, how long was the conversation?

A. Thirty minutes.

Q. Thirty minutes. And what was discussed?

MR. CAPOBIANCO: Objection. I'm going to have to assert the attorney/client privilege since he is our designee.

MR. HANCOCK: I don't think that applies. He is not your counsel.

MR. CAPOBIANCO: If he is our designee, I think that our conversations are protected by the attorney/client privilege.

THE WITNESS: I don't know what to say.

MR. HANCOCK: Are you instructing him not to answer?

MR. CAPOBIANCO: I am.

Q. (By Mr. Hancock) Okay. Are you going to take his instruction?

A. Is there a risk -- I mean, I don't mind answering the question. I'll answer the question.

Q. Okay.

A. We talked about really the focus was on a series of questions and four exhibits that were sent

to me via e-mail by Neil.

Q. When were you sent the four exhibits?

A. In the last three or four days.

Q. And what were the exhibits or documents? Do you have those?

A. I have them with me, yeah.

Q. Great. Thanks.

A. I printed them out. Exhibit A, B, C, and D.

MR. MARSDEN: Printed them out in color.

A. Well, I printed them out like that because the black cartridge was empty, I think.

Q. Do you by chance have a copy of the e-mail?

A. I do at home. I'd be happy to -- I could e-mail it to you.

Q. That would be great.

A. Sure.

Q. And when was this e-mail sent to you?

A. It would have been, like I say, within the last three or four days. It may have been on Monday.

Q. Okay. During this 30 minute conversation that took place over the phone --

A. Yes.

Q. -- can you tell me what was discussed?

A. Yes.

Q. And you also understood in 2002, early 2003 as the CEO of ClearOne, that a DOJ investigation was being undertaken and that could result in a criminal litigation and claims being brought against Strohm and Flood.

MR. CAPOBIANCO: Objection to form.

Q. Is that right?

A. Yes.

Q. And those criminal claims that could be brought against Strohm and Flood would relate to or arise out of the SEC action, correct?

MR. CAPOBIANCO: Objection to form.

Q. The same underlying claims?

A. Yes.

Q. And that was your knowledge and understanding as the CEO in December of 2002 when you were interim CEO, and early January of 2003; is that right?

A. Yes.

Q. There was also, we talked briefly about this, but there was a whistle blower action filed on February 11, 2003 in the Sarbanes Oxley?

A. Yes.

Q. And that was filed by Mr. Morrison?

Q. And those would include the DOJ investigation?

A. As far as I knew, yes.

Q. And that would include any subsequent criminal indictments or litigation that the DOJ may bring down against Susie; is that your understanding?

A. As far as I knew, yes.

Q. And that was your understanding as the interim CEO of ClearOne?

A. Yes.

Q. And that was your understanding either in December of 2002 or early 2003?

A. Yes. Whenever Steve was engaged, it was made clear he was her counsel. And again, Max was going to be Fran's.

Q. Okay. I'm just trying to make sure I understand what your understanding of what the scope of his representation was going to be.

A. Sure.

Q. And as I understand it, what you were telling me is that when he was retained you understood, as the CEO of ClearOne, the scope of Mr. Marsden's representation was going to be representing Ms. Strohm in the SEC action, right?

A. Yes.

Q. He would represent her in the DOJ investigation?
A. Yes.
Q. And as you have told me, any and all other claims that might be brought against her, including any criminal indictments or criminal actions brought against her?
A. Yes.
Q. That was your understanding of what his retention was when ClearOne approved Mr. Marsden to be retained to represent Susie Strohm?
A. Yes.
MR. CAPOBIANCO: Objection to form.
Q. Do you recall any discussion by any of the board members with respect to the scope of Mr. Marsden's retention?
A. "Scope" meaning? Any limit on scope?
Q. What it was limited to.
A. No.
Q. And as the 30(b)(6) designee on behalf of ClearOne, is it your testimony you don't recall any other discussions or communications by any board member limiting the scope of Mr. Marsden's representation?
A. No limitation of scope.

Q. Then there was no discussion or agreement that his representation be limited solely to the SEC action?

A. No discussion about that.

Q. Okay. Who is Rod Snow?

A. Partner at Clyde, Snow, Sessions.

Q. Okay. And maybe this -- you told me this earlier but since we are on this topic, to make it nice and clean, why was Clyde, Snow, Sessions & Swenson and Rod Snow retained?

A. I don't know specifically why. I was just told that they had retained Clyde, Snow, Sessions. I know Rod was a partner. We were represented in the hearing with the SEC by Neil Kaplan from Clyde Snow, who represented the company. So I was just told it was Clyde Snow.

Q. Okay. And was it your understanding, though, that Rod Snow and Clyde, Snow, Sessions Swenson was being retained to represent ClearOne?

A. Yes.

Q. They were not being retained to represent Susie Strohm or Fran Flood?

A. No.

Q. And what type of representation were they going to be providing ClearOne?

A. Well, I mean, at that time they were the firm that was representing us through the initial SEC action right through the hearing with the SEC on whether or not a monitor would be put in place.

Q. Okay. Were they also going to provide representation for ClearOne in connection with the DOJ investigation?

A. At the time, I don't know that that was ever really discussed. My assumption was that Clyde Snow was the firm representing ClearOne in all potential legal issues at the time.

Q. Okay. With ClearOne, at least in December of 2002 when you came on board, early 2003, facing the SEC action/criminal proceedings which at that time consisted of the SEC investigation and the DOJ investigation, did ClearOne want to get the cooperation of Susie Strohm and Fran Flood in helping to defend against these actions?

A. Yes.

MR. CAPOBIANCO: Objection to form.

Q. Both in connection with the claims brought against ClearOne and the SEC action and the DOJ investigation?

MR. CAPOBIANCO: Objection to form.

Q. Wanted their cooperation?

A. Yes.

Q. Do you recall if there were discussions about entering into a joint defense privilege and confidentiality agreement?

A. I do remember a discussion around a joint defense. But specifics, I don't.

Q. Okay. Did you have any discussions with Rod Snow or anyone else in connection with a joint defense privilege and confidentiality agreement?

A. I recall a meeting at Clyde Snow Sessions. I recall several attorneys, Scott and Rod being at the meetings, but I don't recall that specific level of detail.

Q. Okay. You've told me that as the CEO, you and Mr. Rand and the board of directors kind of oversaw and kind of coordinated ClearOne's response and defense in connection with the SEC criminal proceedings.

A. Uh-huh (affirmative).

Q. You need to say yes or no.

A. Yes.

Q. As the CEO of the company, did you receive copies of correspondence and pleadings in these actions from your legal counsel?

A. Yes.

Q. And those were potential criminal actions and litigation that you understood, as the CEO, would have arisen out of or would have been related to the SEC action and its claims dealing with revenue recognition?

A. Yes.

MR. CAPOBIANCO: Objection to form.

Q. Is that right?

A. Yes.

Q. And the purpose of this agreement, do you know -- do you know if it was to -- well, strike that.

Let me have you turn to page 3 of Exhibit 2. And it's Recital K. You told me earlier that you understood that ClearOne wanted to get the cooperation of both Ms. Flood and Ms. Strohm in defending against the DOJ action, potential criminal claims, and the SEC action; is that right?

A. Yes.

MR. CAPOBIANCO: Objection to form.

Q. And if you'd read Recital K for me.

A. "It is the purpose of this Agreement to ensure that any exchange and/or disclosure of the Defense Materials contemplated herein does not diminish in any way the confidentiality of the

Defense Materials and does not constitute a waiver of any privilege or immunity otherwise available."

Q. Okay. Is that stated purpose consistent with your testimony dealing with trying to get the cooperation of Ms. Flood and Ms. Strohm, as you understand it?

A. Yes.

MR. CAPOBIANCO: Objection to form.

A. Yeah, there was no question at the time, although I did not see this document, that the approach was to have a united front.

Q. And this united front that you understood the parties were trying to put together in early January and February of 2003, you understood that was a united front for ClearOne, Ms. Strohm, and Ms. Flood all to get their legal defenses together jointly in connection with the SEC action?

A. Uh-huh (affirmative).

Q. You need to say yes or no.

A. Yes.

MR. CAPOBIANCO: Objection to form.

Q. And also with respect to the DOJ action?

MR. CAPOBIANCO: Objection to form.

A. Yes.

Q. And also with respect to any criminal

indictments or criminal actions brought against Ms. Flood, Ms. Strohm, or ClearOne resulting from or relating to the SEC action; is that true also?

MR. CAPOBIANCO: Objection to form.

A. At the time, yes.

MR. MARSDEN: Let me interrupt for a second. I'm going to walk out right now. We have a conference call with the court at 11:00. I will come back just before to make sure --

MR. HANCOCK: Do we need to break? Are you going to participate in that, Neil?

MR. CAPOBIANCO: Yes, I'm going to participate.

MR. HANCOCK: We'll break at that point.

Q. (By Mr. Hancock) This -- what did you call it? A --

A. United front.

Q. The united front, thank you. This united front that you talked about was an agreement or understanding by ClearOne, their counsel, along with counsel for Strohm and also for Ms. Flood; is that right?

A. Yes.

Q. As you understood it?

A. Yes, I did.

Q. And so I just have a couple more questions and then we will take a break.

A. And I think that was done based on, at the time, the need for both parties or all three parties to kind of stay in lock-step. The relationship had clearly changed as far as how I thought those individuals were treated by the board and whatnot, but everybody seemed to be on the same page that that was important that it was a united front.

Q. And this united front was -- you wanted to have a united front with respect to a defense, production of documents, and discovery with respect to the SEC action and the DOJ action and any future possible criminal indictments and criminal actions being brought. Would that be fair?

MR. CAPOBIANCO: Objection to form.

A. Yes. But I will say after Susie and Fran left, I never talked to them again.

Q. I know.

A. Okay.

Q. Let me have you turn to page 6 of Exhibit 2, and if you would read paragraph 12.

A. "The Agreement memorializes prior oral understandings pursuant to which Defense Materials have been exchanged. All Defense Materials

MR. CAPOBIANCO: Objection to form.

A. In terms of -- well, the understanding I had at the time was that they would be indemnified from that point early on until some future point and they would also stay on the company payroll.

Q. Okay.

A. And that issue was, I think, more specific to Fran because of Fran's employment agreement, where there was a clause in her employment agreement that the only reason Fran could be terminated was for fraud; and that if they terminated her, that would blow up the D&O policy.

Q. Okay. So both of them were kept on the payroll?

A. Yes.

Q. To assist in the D&O policy litigation?

A. The sense I had at the time was that if there hadn't been a D&O policy at risk, that they may have very well terminated them at the time.

Q. Okay. Were you involved in any discussions about what steps, conditions, or procedures the company would have to go through to provide indemnification to Ms. Strohm or Ms. Flood?

A. Nothing specific. I mean, in terms of steps or procedures, no. Nothing specific. Just

that it was agreed that they would provide indemnification.

Q. And as part of this indemnification, as you understood it, would that include -- for example, if Mr. Marsden had performed legal services and prepared an invoice and sent it to ClearOne, was it your understanding that ClearOne would pay those invoices?

MR. CAPOBIANCO: Objection to form.

A. Yes. There was nothing that I was aware of that sat outside that would prevent payment in terms of indemnification.

Q. So when you talk about indemnification, your understanding as the CEO was this concept of indemnification would include paying Mr. Marsden's invoices as he submitted them in connection with representing Ms. Strohm?

A. Yes.

Q. Okay. Was there any discussion by the board or yourself, or an understanding that ClearOne would not pay Mr. Marsden's invoices and would simply wait to make payment until after the SEC action was over or after any criminal action against Ms. Strohm was concluded?

A. There were conversations about reluctantly

paying. But when the conversation ended, the decision was always that they would continue to pay.

Q. Okay.

A. And I believe that trend continued for a number of years.

Q. Okay. And as I understand it, the time that the board had decided to provide what you call indemnification to Ms. Strohm, the understanding by the board and that you also had in those discussions was that ClearOne would pay the invoices submitted by Mr. Marsden in representing Ms. Strohm?

MR. CAPOBIANCO: Objection to form.

Q. Is that correct?

A. Yes.

Q. And that there was no discussion or agreement by the board that they would simply wait until the conclusion of what we called the SEC criminal proceedings to then determine if it was going to pay Ms. Strohm's fees?

MR. CAPOBIANCO: Objection to form.

A. There were conversations at some point about not paying, or waiting until everything had settled and until we, you know, had gotten past the whole, I guess the whole issue, per se. But at the end of the day, they continued to do that because I

think we continued to need the support of both Susie and Fran as they went through the process.

Q. Okay?

A. They did talk about it, but they never took any action.

Q. Okay. What I'm trying to focus on is at the time that the board made the decision to indemnify, as you called it, Ms. Strohm with respect to her fees. When that decision was made, if I understand what you're telling me, the board made the decision, "We will provide this concept of indemnification." And as part of that concept of indemnification you understood that ClearOne would pay the invoices that Mr. Marsden submitted to ClearOne for representing Ms. Strohm; is that correct?

A. Yes.

MR. CAPOBIANCO: Objection to form.

Q. And that although there may have been discussions that, "Maybe down the road we might wait to pay," the original agreement by the board was that they wouldn't do that; that this indemnification concept that had been approved was, "We are going to pay as the invoices come in. We are not going to wait."

MR. CAPOBIANCO: Objection to form.

Q. Is that correct?

A. Yes. I don't recall any deadline dates or we are not going to pay past a certain dollar amount. They didn't -- yes.

Q. Okay. Do you have an understanding of the difference between the legal term "indemnification" versus "advancement"?

A. Well, I could probably come up with one.

Q. I'm just asking if you do.

A. Well, yeah. I mean, indemnification just meant that they were covered by the corporation. That was part of being an officer. They had indemnification clauses or provisions, as opposed to advancement, to me, would be advancing somebody's fee that at some point may or may not get paid back. Yeah, they can be very different things.

Q. So to you, advancement would be something where they say, "Here is $100,000. Use it for your defense"?

A. Correct.

MR. CAPOBIANCO: Objection to form.

Q. And it's your understanding that indemnification, as you understood was approved by the board and in how ClearOne operated while you were

there -- let me rephrase.

While you were on the board, not the board but the CEO, and then during the time period of 2002 until you left in 2004, did ClearOne always pay the bills invoiced from Mr. Marsden for representation of Ms. Strohm?

A. They did. Although I would say there was some slow pay issues. But they did.

Q. They did. And was it your understanding those payments were being made under what you understood was the concept of indemnification?

A. Yes.

Q. You weren't advancing ahead of time the payments, you were paying them as they were being billed and submitted to you?

MR. CAPOBIANCO: Objection to form.

A. That is correct.

Q. Okay. Can you tell me anything else that was discussed by the board in connection with the decision to indemnify Ms. Strohm?

A. Not really. I mean, once those decisions had been made, Susie and Fran almost became nonissues. I mean, the discussion was at that point really about ClearOne and the SEC. And once they had, you know, left ClearOne - and when I say "left,"

they were set aside - but once the decisions had been made that they would stay on the payroll and be indemnified, Susie and Fran really weren't the focus going forward at that point. It was really about ClearOne.

Q. Okay. So I just want to make sure I understand your memory of what happened with respect to the indemnification so we have the sequence and the sum and substance of what the board discussions were.

As I understand what you've told me, and you tell me if I'm not characterizing it correctly, the board made a decision to provide this concept of indemnification to Ms. Flood and Ms. Strohm and that was so that you could have this unified front.

A. Yes.

MR. CAPOBIANCO: Objection to form.

Q. And you felt that that was a key component of having the unified front and providing the indemnification to Ms. Strohm and Ms. Flood?

MR. CAPOBIANCO: Objection to form.

A. I did.

Q. And the concept of the indemnification that was approved by the board was that as Mr. Marsden submitted invoices to ClearOne, those

invoices would be paid.

A. Yes.

MR. CAPOBIANCO: Objection to form.

Q. And although there may be a slow pay while they are reviewing the bills, the board had not limited the indemnification concept to saying, "We are going to stop paying the bills at some time in the future." Is that right?

MR. CAPOBIANCO: Objection to form.

A. Yes.

Q. And the concept was that until either the SEC action or the criminal investigation or any related proceeding to the criminal action was concluded, your understanding was that the board had approved that going forward until that ended they would pay the invoices submitted by Mr. Marsden in representing Susie Strohm?

MR. CAPOBIANCO: Objection to form.

A. Yes.

Q. Let's mark this as Exhibit Number 4.

**(EXHIBIT 4 WAS MARKED.)**

Q. One last comment back on the time period when the board made the decision under this to provide this concept of indemnification that you've described. You don't recall any of the board members

review the terms of the agreement on pages 2 through 6?

A. Yeah. At the time, I'm fairly confident I read this prior to signing it, yes.

Q. Okay. Let me have you look at page 3, if you would.

A. Uh-huh (affirmative).

Q. Under Section 7 there's a section called Cooperation in Related Proceedings.

A. Uh-huh (affirmative).

Q. Does this address what you were talking about before where the board had decided to provide this concept of indemnification that you described as part of this unified front and getting cooperation from Strohm?

MR. CAPOBIANCO: Objection to form.

A. I can't say I recall the indemnification being leveraged to get them to sign or participate, but it was certainly part of the conversation.

Q. And I don't mean to say it was leveraged. I mean more to say that --

A. That they were --

Q. In order to have a united front, the board felt like it was important to provide the indemnification to Strohm; is that right?

A. Yes.

Q. Okay. And prior testimony is consistent with paragraph 7 on page 3 of Exhibit 5; do you agree?

MR. CAPOBIANCO: Objection to form.

A. Yes.

Q. Okay. So as you understand it, as part of the Employment Termination Agreement, Strohm had agreed to cooperate with ClearOne in connection with the SEC action and any related proceedings; is that right?

A. Yes.

Q. And then let me have you turn to Section 8, if you would, on Indemnification. This is the -- as you understand it, is this the section that provides for ClearOne's agreement with respect to this concept of indemnification for Ms. Strohm --

MR. CAPOBIANCO: Objection to form.

Q. -- that you testified about earlier?

A. Yes.

Q. And this is the indemnification concept that you testified would be as invoices were presented to ClearOne from Mr. Marsden, they would be paid?

A. Yes.

Q. That was sort of the agreement: You give us this, and we will give you the other side. Is that right?

A. Yes.

Q. Those are the kind of exchanged promises. Strohm will get X number of dollars under the Employment Termination Agreement, which is $75,000 in Section 3.

A. Uh-huh (affirmative).

Q. Strohm will get the indemnification that you describe how you understood it in Section 8.

A. Uh-huh (affirmative).

Q. And in turn for those two items of consideration that Strohm would be giving ClearOne, ClearOne would get a release of claims by Strohm, right?

A. Yes.

MR. CAPOBIANCO: Objection to form.

Q. And ClearOne would get Strohm's cooperation in related proceedings, correct?

MR. CAPOBIANCO: Objection to form.

A. Yes.

Q. And ClearOne would get the cancellation of the stock options; is that right?

A. Yes.

Q. And as you understood it, as the CEO of ClearOne, that was the negotiated and agreed upon terms of the Employment Termination Agreement between Strohm and ClearOne.

A. Yes.

Q. That's what you signed and agreed to as the CEO of ClearOne on December 5, 2003?

A. Yes.

Q. Let's mark this as Exhibit Number 6.

**(EXHIBIT 6 WAS MARKED.)**

Q. Let me have you go back to Exhibit 5, and Section 15 on page 5.

A. Okay.

Q. Section 15 states that there's a condition subsequent. What was your understanding of what Section 15 meant?

A. I mean, that Susie, having been the CFO at the time, would sign -- that was a condition of this was signing settlement documents with the SEC.

Q. Okay. And Exhibit 6, have you seen this document before?

A. I don't remember seeing this one.

Q. Okay.

A. But I may have.

Q. Okay. Do you know whether or not Section

Q. And this you testified you reviewed to familiarize yourself and remember what the terms were?

A. Yes.

Q. And do you feel that based, on that review, you are able to answer questions about what you understood the terms of Exhibit 9 were?

A. Yes.

Q. Did ClearOne agree to pay invoices from Mr. Marsden for the services he rendered in representing Ms. Strohm as they were billed within 30 days after receipt?

A. Did they actually do that or is --

Q. Is that what they agreed to?

A. Yes.

Q. And did ClearOne also agree that any amount unpaid after the 30 days would bear and accrue interest at a rate of 18 percent?

A. If that was in the original draft as it is here, yes.

Q. Okay. And is that your understanding of paragraph 3, the second paragraph where it says, "Any amount billed and unpaid after such thirty day period shall bear and accrue interest at the rate of 18 percent per annum from the date billed until paid?"

A. Yes.

MR. CAPOBIANCO: Objection to form. Are you asking what he thinks it means now?

MR. HANCOCK: I'm asking him with respect to when he signed this letter as ClearOne's CEO. Okay?

Q. (By Mr. Hancock) Is that your understanding?

A. Yes.

Q. Thank you. And in the first paragraph -- before we get there, if I remember correctly, and I just want to confirm, you stated earlier that it was your understanding, at the time that Mr. Marsden was retained and that you signed Exhibit 9 on behalf of ClearOne, that the scope of his retention would be the SEC action?

A. Yes.

Q. It would include the DOJ action.

MR. CAPOBIANCO: Objection to form.

Q. Is that correct?

A. Yes.

Q. And if I understand you, and you tell me if I'm wrong, it would include any criminal indictments; defending against those with respect to Ms. Strohm?

MR. CAPOBIANCO: Objection to form.

A. Yes. Nothing was excluded, as I remember.

Q. Okay. I'm just trying to understand what your understanding was of what it included, okay?

A. Okay.

Q. And you understood at that time that, based on the DOJ action, there was the possibility of criminal indictments and a criminal action against Ms. Strohm; is that correct?

A. Yes.

MR. CAPOBIANCO: Objection to form.

Q. And at the time you signed this agreement, you understood that Mr. Marsden's retention, as set forth in Exhibit 9, included representing Ms. Strohm in those actions.

MR. CAPOBIANCO: Objection to form.

Q. Meaning the SEC action, the DOJ investigation, criminal indictments, and any criminal action against Ms. Strohm. Is that correct or not?

MR. CAPOBIANCO: Objection to form.

A. Yes.

Q. And the first paragraph states, "This letter will summarize and confirm the agreement for my firm, Bendinger, Crockett, Peterson & Casey, to represent Susie Strohm's interests in connection with

A. Yes.

Q. And did you understand where it says "further related investigations and litigation," with your understanding that there was a DOJ investigation going on, that that term, "in connection with further related investigation and litigation," would include, if it happened, a criminal indictment and criminal action against Ms. Strohm?

MR. CAPOBIANCO: Objection to form.

A. That would have been my understanding, yes.

Q. Okay. And would that understanding be -- your understanding of the scope of Mr. Marsden's representation, would that be inconsistent with the position that he was only retained to represent her in the SEC action?

A. Would you --

Q. Never mind. Bad question. I'll just go on.

A. Okay.

Q. Let's go to paragraph 4. It's entitled Rates and Staffing.

A. Uh-huh (affirmative).

Q. What was your understanding as to what that paragraph, what the agreement was between the

A. My understanding is that it was as written here.

Q. Okay. And as written, what was your understanding? I just need to make sure of your understanding.

A. They would be paid based on the terms as outlined within 30 days for billable hours on the work that was done.

Q. And if they weren't paid and Mr. Marsden had to bring an action to recover his fees from ClearOne, was it your understanding ClearOne would pay his fees and costs in enforcing the terms of the retainer agreement?

A. If they were found to be --

Q. Successful?

A. Yes.

Q. Okay. So if ClearOne just decides they are not going to pay --

A. Yes.

Q. -- and they ultimately are found that they weren't entitled to stop paying, it was your understanding that Mr. Marsden would recover all of his reasonable attorney's fees and costs in getting a judgment to get the money for his attorney's fees and costs from ClearOne?

MR. CAPOBIANCO: Objection to form.

Q. Is that your understanding?

A. Yes.

Q. After you signed and read -- prior to signing the retainer agreement dated January 29, 2003, did you review each of the provisions?

A. Yes.

Q. And after reading the retainer agreement, did you think that Mr. Marsden's scope of his retention in representing Ms. Strohm was limited solely to the SEC action?

A. No.

Q. Did you have the understanding at that time that based on the DOJ action, his scope of representation would be expanded beyond civil litigation to include representing her in criminal actions that related to or were in connection with base allegations of revenue recognition in the SEC civil complaint?

MR. CAPOBIANCO: Objection to form.

A. Yes. That would have been my expectation.

Q. And that was your understanding?

A. Yeah. He was the only counsel referenced working on Susie's behalf for whatever the issue was.

Q. And as I understand it, as the CEO of

ClearOne you understood that the scope of his representation was not just limited to civil litigation.

A. That's correct.

MR. CAPOBIANCO: Objection to form.

MR. HANCOCK: Just a second. What's the form objection?

MR. CAPOBIANCO: Leading.

MR. HANCOCK: He's your 30(b)(6) designee.

MR. CAPOBIANCO: You called him as a fact witness.

MR. HANCOCK: This is the topic on which he was designated as a 30(b)(6).

MR. CAPOBIANCO: I think the question is compound and confusing.

MR. HANCOCK: Tell me how it is compound and I will fix it.

MR. CAPOBIANCO: I'm not going to do that.

MR. HANCOCK: Okay. Then I won't fix it.

A. Just to be clear, all of these were reviewed and approved by the board. And as invoices came in from a variety of counsel, they were all reviewed. There was a pattern of slow pay or no pay. I know in the case of Parsons, I know in the case of Max Wheeler, I know in the case of a couple others,

there was ongoing battles back and forth. Even when we left Clyde Snow and went to Parsons Behle, their final invoice was one that the board insisted on negotiating their fees down. So there was a pattern there.

Q. (By Mr. Hancock) Was Exhibit Number 9 presented to the board, the January 29, 2003 retainer agreement from Mr. Marsden, for their review?

A. Yes. My assumption would be -- do I remember that? No. But they were reviewing anything that was legal. We were reviewing as a group, the board included.

Q. Did the board, or anyone else at ClearOne, prior to signing or prior to you signing the January 29, 2003 retainer agreement, state that Mr. Marsden's representation that they were agreeing to was limited in scope to only the SEC civil complaint or civil litigation?

A. No. In fact, I think one of the reasons that they fought so hard about the D&O issue was the expectation was that legal bills would be significant as time went on.

Q. And --

A. For any matter of issues, any number of issues, not just the SEC.

Q. And at the time the board was concerned about Mr. Marsden's fees expanding, the board understood that there was a DOJ criminal investigation underway, correct?

A. Yes.

Q. And they understood, based on those discussions at the board level, that they could expand to the defense of Ms. Strohm based on criminal indictments in a criminal action; is that correct?

MR. CAPOBIANCO: Objection to form.

A. Yes.

Q. And with that understanding from the board, you were authorized to enter into and sign, on behalf of ClearOne, Mr. Marsden's January 29, 2003 retainer --

MR. CAPOBIANCO: Objection to form.

Q. -- agreement in Exhibit 9, correct?

A. Yes.

MR. HANCOCK: Is your objection as to form anything other than leading?

MR. CAPOBIANCO: You are asking him to testify as to what the board's understanding was rather than any discussions he had with the board.

MR. HANCOCK: He's a 30(b)(6) designee.

MR. CAPOBIANCO: You can go ahead and do

So it was agreed upon that this is how they were going to proceed.

Q. Did the board members state and agree that they understood that his representation was going to include the DOJ investigation?

MR. CAPOBIANCO: Objection to form.

A. I don't remember any separation of DOJ versus SEC in terms of costs and legal expense.

Q. It was all going to be covered?

A. At that time, yeah. Not happily, but yes.

Q. Let me have you look at the second page of the January 29, 2008 letter up at the top. It states, "Ms. Strohm and ClearOne agree to be jointly and severally responsible for payment of all amounts billed under this Agreement." What's your understanding of what that meant?

A. "Severally." That's an interesting word. Well, that between Susie and ClearOne, they would be jointly responsible for payment of all amounts. I'm not quite sure how to interpret "severally."

Oh, either together or individually. Yeah, that makes sense.

Q. So when you say that, was it your understanding that if Ms. Strohm didn't pay the bills of Mr. Marsden for representing Ms. Strohm, ClearOne

Q. And were you authorized by the board to sign Exhibit 10 on behalf of ClearOne?

A. Yes.

Q. Okay. What was your understanding as to why Mr. Marsden was sending to you and Ms. Strohm Exhibit Number 10?

A. That he was continuing to represent Susie but he was with a different firm.

Q. Okay. So prior to receiving this letter, had you been informed that Mr. Marsden was changing firms from --

A. I don't think so. I don't remember. And at the time, I don't think it was -- it felt more like just a notification than anything else.

Q. Okay. Let me have you look at the first paragraph where Mr. Marsden says, "As you know, I recently left the law firm of Bendinger, Crockett, Peterson & Casey, and joined the law firm of Dorsey & Whitney, LLP." That's pretty basic.

A. Yes.

Q. And the next section says, "Our engagement agreement needs to be updated to reflect this move."

A. Uh-huh (affirmative).

Q. What did you understand him to mean when he was referencing "our engagement agreement"?

A. Well, other than the change of firms, nothing else changed. It was --

Q. When he says "our engagement agreement," did you understand him to be referring to Exhibit 9?

A. Is this the original --

Q. Yes.

A. Yes.

Q. And when he says "needs to be updated to reflect the move," did you understand he wanted Exhibit 9 updated and amended so that it would show that he was at a new firm?

A. Yes.

Q. And the next sentence says, "The rest of this letter is intended to serve as the update." What did you understand that to mean?

A. He was outlining the specifics as far as what he was representing and involved with as far as Susie. But I always felt that the relationship was between Susie and Steve, and not Susie and whichever firm he was with.

Q. Okay. Did you understand --

During the course of your work for ClearOne or for any of your other companies, had you ever been involved in contracts where the parties subsequently agreed to amend the terms of the

contract?

A. Yes.

Q. And when you did that in your practice, was that amendment usually to the agreement, just saying, "Here are the terms of the original contract that we are changing. Everything else is going to stay the same --"

A. Yes.

Q. "-- except for what we have changed in the amendment?" Is that right?

A. Yes.

Q. So when Mr. Marsden is stating in the first paragraph in Exhibit 10, where he says, "The rest of this letter is intended to serve as the update," did you understand that the purpose of Exhibit 10 was to sort of amend or update certain terms of Exhibit 9 and leave the rest unchanged?

A. Yes.

Q. Okay. And so let's look at the terms that were specifically changed so we can get an understanding of what was changed and what was left in.

MR. CAPOBIANCO: Objection.

Q. I'll rephrase it. Did you then consider Exhibit 9 and 10 to be essentially combined as one

agreement, with 10 merely updating Number 9?

A. Yes. I think "update" is the correct word.

Q. So it is updating it with respect to, "I'm in a new firm." It updates it with respect to his fee disbursement and billing in paragraph 2.

A. Yes. It was updated notification.

Q. And it updates it with respect to other representation, completing services under paragraphs 3 and 4.

A. Yes. Correct.

Q. Okay. So this -- if I understand, was it your understanding this was similar to an amendment to Exhibit 9?

A. Yes. Effectively, yes.

Q. Okay. And so terms that were not changed or modified in Exhibit 10 would remain terms in Exhibit 9 that ClearOne agreed to, going forward still with Mr. Marsden representing Susie Strohm. Would that be fair?

MR. CAPOBIANCO: Objection to form.

A. That would have been my expectation, yes.

Q. And was that your understanding as the CEO of ClearOne?

A. It was.

Q. And as the 30(b)(6) designee of ClearOne,

Q. Was not as --
A. No.
Q. -- constant?
A. No. It had pretty well been put to bed.
Q. As you sit here today do you know what, if any, litigation was still pending as of March 31, 2004?
A. No. As I sit here I can't tell you what litigation was still pending as of March 31, 2004.
Q. By signing this letter, did you intend to give something in addition to what Susie Strohm received in her Employment Termination Agreement?
A. Something in addition to it?
Q. Yes.
A. No.
Q. Now, Mr. Keough, had you met Cameron Hancock before today?
A. No.
Q. Had you spoken to him on the phone?
A. In terms of setting up a time for deposition, yes.
Q. Okay. You didn't discuss anything else with him?
A. No.
Q. Had you met Steve Marsden before today?

A. Yes.

Q. Do you recall when the first time was?

A. Well, it would probably have been early on in 2003 when Susie appointed him legal counsel and we started to head down that path. I mean, I don't know, it could have been at a deposition with the SEC that I gave where legal counsel was there.

Were you there for that?

Yeah, with Susie. Because I know Fran was there, Max was there, and Steve was there, Susie was there, Martinez and her companion from the SEC were there. So yeah, I met Steve early on as Susie's designated counsel.

Q. And when was the last time that you met with Steve Marsden?

A. I think it was our discussion prior to the criminal trial.

Q. Okay.

A. And again, I can't give you an exact time. But I was asked by both sides to just come in, and I did.

Q. Okay. And were you called to testify at trial?

A. I was not.

Q. Okay. And did you discuss, at any time

that retainer agreement, that the reference to "further related investigations" referenced and included the DOJ investigation; is that correct?

A. Yes. There were no limitations stipulated at the time.

Q. And that would have been your understanding, that the scope of that retention agreement included the DOJ investigation, whether you knew about it before January 29 or after, right?

A. Yes.

Q. And at least your earlier testimony was that you learned, more than likely, about the DOJ investigation prior to January 29, 2003; just couldn't remember the specific date?

A. I don't know the specific dates. There was a lot happening almost daily.

Q. Okay. Now, with respect to Exhibit 10, I want you to look at Exhibit 10 and Exhibit 9.

A. Okay.

Q. Exhibit 10 and Exhibit 5, I mean, which is the ETA.

A. Okay.

Q. And Exhibit 5 you signed on December 5, 2003, correct?

A. Uh-huh (affirmative).

Q. And in Recital C it references a grand jury investigation being conducted by the United States Department of Justice. Do you see that?

A. Uh-huh (affirmative).

Q. So would it be fair to say that as of December 5, 2003 you understood and you knew that there was an ongoing criminal investigation being conducted with respect to Strohm and Flood?

A. Yes.

Q. And you also understood that that was still ongoing when you signed the March 31, 2004 retainer agreement, Exhibit 10?

A. Yes.

Q. So I just wanted to help clarify that in connection with Neil's request whether or not you knew if there were any proceedings still ongoing as of March 31, 2004, wouldn't it be fair to say that when you signed the updated Exhibit 10 that was updating Exhibit 9, and they became the same agreement, as you've testified, you understood that the scope of that retention included the ongoing criminal investigation against Mrs. Strohm; is that correct?

A. Yes.

Q. Okay. That's all I have.

Justice; not that it's over. Correct?

A. Oh, right.

Q. So you understood it was still ongoing, hadn't finished at that point in time, correct?

MR. CAPOBIANCO: Objection to form.

A. Yes.

Q. And when you signed Exhibit 10, nobody had informed you that the grand jury investigation was over and criminal actions weren't going to be brought against Ms. Strohm, had they?

A. No.

Q. So you understood that there were still potential indictments that could come down and criminal action brought against Ms. Strohm when you signed Exhibit 10, correct?

A. Yes. In fact, that was my expectation.

Q. And you understood, based on that expectation, that was still the scope of Mr. Marsden's representation under Exhibits 9 and 10, correct?

A. Yes. There were no limits ever decided on that representation.

Q. Great. That's all I have.

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# EXHIBIT 4

# JOINT DEFENSE PRIVILEGE AND CONFIDENTIALITY AGREEMENT



## Recitals

A. The Securities and Exchange Commission ("SEC") has brought a civil action known as *Securities and Exchange Commission v. ClearOne Communications, Inc., Frances M. Flood, and Susie Strohm* alleging certain improprieties connected to the quarterly and annual financial statements of ClearOne Communications, Inc. ("ClearOne") involving both ClearOne and certain individual current or former employees of ClearOne (the "SEC Action").

B. ClearOne has been notified by the United States Department of Justice that a criminal investigation is underway that arises out of or is connected to the allegations made in the SEC Action and that this investigation is aimed at both ClearOne and certain individual current or former employees of ClearOne. (the "DOJ Action").

C. Investor suits against ClearOne have been filed, and may continue to be filed, alleging certain violations of federal and/or state securities laws arising out of the allegations made in or connected to the SEC Action or DOJ Action (the "Investor Suits").

D. Based on the existence of the SEC Action, the DOJ Action, and the Investor Suits, the undersigned attorneys have reason to anticipate that other investigations may arise, at either a state or federal level, and that other civil lawsuits may be filed based upon the allegations in or the existence of any or all of the SEC Action, DOJ Action, or Investor Suits (the "Anticipated Actions").

E. The undersigned counsel believe that the SEC Action, DOJ Action, Investor Suits, and Anticipated Actions (collectively, the "Proceedings") relate to or involve common issues and

concerns of their respective clients and that such clients have a mutuality of interests in defending the Proceedings.

F. As a result of the Proceedings, the undersigned counsel anticipate civil or criminal discovery in the form of interviews, testimony, and/or document production from ClearOne, its current or former employees, its business partners, affiliates, agents, or others with whom it does or has done business (the "Discovery").

G. The undersigned counsel wish to continue and pursue their separate but common interests, and to avoid any suggestion or claim of waiver of the confidentiality of or immunity of communications and documents protected by the attorney-client privilege, the work product doctrine, or any other privilege or immunity.

H. It is the intention and understanding of the undersigned attorneys that communications among and between the undersigned and their respective clients, and any joint interviews of prospective witnesses or any interviews obtained by the undersigned counsel with the knowledge, consent, and on behalf of the other undersigned attorneys, are and shall remain confidential and are and shall continue to be protected from disclosure to any third party by our clients' attorney-client privilege and immunities, except as set forth herein.

I. The undersigned counsel have mutually concluded, on the basis of currently available information, that no conflict of interest appears to exist among their clients with respect to the Proceedings and that the respective interests of their clients will best be served by a common and joint defense.

J. In order to pursue a joint defense effectively, undersigned counsel have also concluded that, from time to time, the mutual interests of their respective clients will be best served by sharing documents, factual material, mental impressions, memoranda, interview

reports, litigation strategies, and other information including the confidences of each client – all of which will be hereinafter referred to as the "Defense Materials" (but only to the extent that such material and/or information was not already in the possession of the recipient prior to the communication of such material and/or information by a signatory to this Agreement or was thereafter independently obtained).

K. It is the purpose of this Agreement to ensure that any exchange and/or disclosure of the Defense Materials contemplated herein does not diminish in any way the confidentiality of the Defense Materials and does not constitute a waiver of any privilege or immunity otherwise available.

IT IS THEREFORE AGREED as follows:

1. Except as provided herein, all Defense Materials shall remain confidential and shall be protected from disclosure to adverse or other parties as a result of the attorney-client privilege, the work product doctrine, and/or any other applicable privileges or immunities. Except as provided herein, the oral or written sharing or disclosure of Defense Materials among the undersigned counsels' firms, and among such firms and their respective clients, shall not diminish in any way the confidentiality of such materials and shall not constitute a waiver of any applicable privilege.

2. All Defense Materials shall be used solely in connection with the Proceedings and related matters. Defense Materials shall not be used by any party to this Agreement for any business purpose or against any party to this Agreement.

3. Neither the undersigned attorneys nor their respective clients shall disclose Defense Materials to anyone not a signatory to this Agreement (except that undersigned counsels' respective clients, attorneys within undersigned counsels' firms, or undersigned

counsels' employees or agents) without first obtaining the consent of all counsel who signed this Agreement who have rights to such Defense Materials. It is expressly understood that nothing contained in this Agreement shall limit the right of any of the undersigned counsel or their respective clients to disclose to anyone as they see fit any of their own documents or information, or any documents or information obtained independently and not pursuant to this Agreement by such counsel or clients.

4. All persons permitted access to Defense Materials shall be advised that the Defense Materials are privileged and subject to the terms of this Agreement.

5. To the extent feasible, Defense Materials disclosed pursuant to this Agreement will be marked or designed "confidential" or "highly confidential." "Confidential" Defense Materials may be made available only to counsel receiving such Defense Materials pursuant to this Agreement and the party represented by that counsel. "Highly confidential" Defense Materials may be made available only to counsel receiving such Defense Materials pursuant to this Agreement.

6. If another person or entity requests or demands, by subpoena or otherwise, and Defense Materials in any forum, including but not limited to the Discovery referred to in Paragraph F above, the recipient of such request or demand shall immediately notify the other parties with rights in the Defense Materials. The person or entity seeking the Defense Materials shall be informed that such materials are privileged and may not be disclosed without the consent of the party or parties that furnished them unless ordered by a Court of competent jurisdiction. Before any disclosure of Defense Materials in response to such a request or demand is made by a party to this Agreement, that party shall take steps necessary and appropriate to facilitate the assertion of all applicable rights and privileges with respect to such Defense Materials, including

permitting all parties to this Agreement a reasonable opportunity to intervene and be heard, and otherwise cooperating with the other affected parties to enable them to take any other appropriate steps to protect their rights under this Agreement.

7. In the event that a party to this Agreement interviews ("Interviewing Party") another party to this Agreement ("Interviewed Party"), all information disclosed during the interview, including notes or memoranda reflecting such information, shall not be disclosed to anyone, including other parties to this Agreement, without the express written approval of the Interviewed Party.

8. Nothing contained herein shall be deemed to create an attorney-client relationship that gives rise to a fiduciary duty between any attorney and anyone other than the client of that attorney. The fact that an attorney has entered into this Agreement shall not in any way preclude the attorney from representing any interest that may be construed to be adverse to any other party to this Agreement or be used as a basis for seeking to disqualify any counsel from representing any other party in the Proceedings and no attorney who has entered into this Agreement shall be disqualified from examining or cross-examining any client who testifies at any proceeding, whether under a grant of immunity or otherwise because of such attorney's participation in this Agreement, and it is herein represented that each party to this Agreement has specifically advised his or her client of this clause.

9. In the event that any party to this Agreement testifies in any Proceeding, that party expressly waives the joint defense privilege, with respect to any Defense Materials provided by that party, that reflects information inconsistent with the party's testimony. It is understood by all parties to this Agreement that the waiver provided herein is intended to be construed narrowly

to waive the conflict of interest described in *United States v. Henke*, 222 F.3d 633 (9th Cir. 2000) and the waiver does not permit the testifying party to reveal, in any way, Defense Materials.

10. Defense Materials shall not be disseminated to other counsel representing individuals or entities involved in the Proceedings unless all parties to this Agreement consent and unless such counsel has executed a copy of this Agreement. If the client(s) of any of the undersigned counsel retain other counsel, Defense Materials shall not be disclosed to such other counsel until he or she has executed a copy of this Agreement. Any disclosure in accordance with this paragraph shall not diminish in any way the confidentiality of the Defense Materials disclosed and shall not constitute a waiver of any applicable privilege.

11. Nothing in this Agreement shall obligate any signatory hereto to share or communicate any Defense Materials or independently obtained or created materials with any other signatory to this Agreement.

12. The Agreement memorializes prior oral understandings pursuant to which Defense Materials have been exchanged. All Defense Materials previously exchanged among the undersigned counsel are subject to the provisions of this Agreement.

13. By executing this Agreement, each undersigned counsel certifies that counsel has explained the contents of this Agreement to his or her respective client and that the client agrees to be bound as a party to this Agreement. Each counsel executing this Agreement represents that counsel is signing both on behalf of himself or herself and on behalf of counsel's client.

14. Each of our clients is free to withdraw from this Agreement upon prior written notice to the other clients, in which case this Agreement shall no longer be operative as to the withdrawing client and its counsel. However, in the event of a withdrawal, this Agreement shall continue to protect all Defense Materials disclosed to the withdrawing client and its counsel prior

to such withdrawal. The withdrawing client and its counsel shall promptly return all Defense Materials and copies thereof and shall continue to be bound by this Agreement with regard to any information learned or obtained prior to such withdrawal and neither the party nor the party's attorney will disclose any information learned or obtained pursuant to this Agreement to any third party. It is further agreed that the confidentiality prescribed above will not become retrospectively inoperative if adversity should subsequently arise among the parties, irrespective of any claim that the joint defense privilege may otherwise become prospectively inoperative by virtue of such claimed adversity.

15. This Agreement may be executed in individual counterparts. Modification of this Agreement can be made, if such modifications are in writing and are signed by each of the undersigned.

CLYDE SNOW SESSIONS & SWENSON

By _____
RODNEY G. SNOW
Attorneys for
ClearOne Communications, Inc.
Dated: _____

SNOW, CHRISTENSEN & MARTINEAU

By _____
MAX D. WHEELER
Attorneys for Frances M. Flood
Dated: _____

BENDINGER CROCKETT PETERSON & CASEY

By _____
M. STEVEN MARSDEN
Attorneys for Susie Strohm
Dated: 2-6-05

# EXHIBIT 5

IN THE THIRD JUDICIAL DISTRICT COURT

COUNTY OF SALT LAKE, STATE OF UTAH

| | |
|---|---|
| SUSIE STROHM and DORSEY & WHITNEY LLP,<br><br>Plaintiffs,<br><br>vs.<br><br>CLEARONE COMMUNICATIONS, INC.,<br><br>Defendant. | Deposition of:<br><br>**JEFFERSON WRIGHT GROSS**<br><br><br>Case No. 080917500<br><br>Judge Robert K. Hilder |

**October 13, 2009 - 9:12 a.m.**

Location: Dorsey & Whitney LLP
136 S. Main Street, Suite 1000
Salt Lake City, Utah

Reporter: VICKY McDANIEL, CSR, RMR

CEO, an acting CFO in order to discharge the responsibilities of Fran Flood and Susie Strohm. So that was certainly being discussed and evaluated as well.

Q. Okay. Let me have you look at Recital C on Exhibit 5.

A. Yes.

Q. This is part of the settlement agreement where you're having defined terms, kind of common in settlement agreements. You've had experience putting them together quite often?

A. I suspect everyone in this room is familiar with them.

Q. Yeah. Okay. And part of the proceedings definition includes the grand jury investigation being conducted by the United States Department of Justice. So did you understand that that, the grand jury investigation, pursuing or investigating whether criminal indictments could be brought down was part of the related proceedings definition?

A. I didn't -- you know, the language is what it is; it says what it says. I think at the time of this agreement we did not believe that any indictment of Susie Strohm was in the realm of possibilities. Judge Kimball had issued an order saying that the SEC

had failed to make a prima facie case of securities fraud violations.

And so as contrasting from Ms. Flood where different determinations were made which we thought would be persuasive to anyone evaluating any claims against Ms. Flood and Ms. Strohm, we did not consider it really possible that Ms. Strohm would be indicted in connection with the SEC.

Q. This is a recital that you helped draft and review in this document, right?

A. And the language says what it says, and you two will go argue it in front of the court. I'm just telling you, as far as in the fall of 2003 that was our state of mind, because -- and it was a calculation that we made, because there was no way we were going to pursue the D&O action if we thought that there was --

Q. Sure. I understand.

A. -- a reasonable possibility of criminal proceedings.

Q. I understand, Jeff. But what I'm asking you is, as you read that today, it provides that -- it talks about the SEC action, which is, that claim was based on the allegations of improper revenue recognition, right?

# EXHIBIT 6

## EMPLOYMENT TERMINATION AGREEMENT

This Employment Termination Agreement ("Agreement") is entered into by and between ClearOne Communications, Inc. ("ClearOne" or the "Company") and Susie S. Strohm ("Strohm") (ClearOne and Strohm shall sometimes be hereinafter referred to collectively as the "Parties").

## RECITALS

A. Strohm has been employed by ClearOne in a variety of positions, most recently as the Company's Chief Financial Officer.

B. On January 15, 2003, the United States Securities and Exchange Commission filed a civil action against ClearOne, Strohm, and Frances M. Flood, who was then serving as the Company's Chief Executive Officer, alleging various improprieties and misstatements in connection with the Company's financial statements (the "SEC Action").

C. The filing of the SEC Action has spawned, and may continue to spawn, multiple related proceedings, including, but not limited to, multiple shareholder securities class actions, multiple shareholder derivative actions, a grand jury investigation being conducted by the United States Department of Justice, a dispute and potential litigation between the Company and its directors and officers liability insurers, and potential litigation between the Company and its former auditor, Ernst & Young (collectively, "Related Proceedings").

D. Soon after the filing of the SEC Action, the Company placed Strohm on a paid administrative leave of absence, and this paid administrative leave has continued in effect at all times up to the execution of this Agreement.

E. Strohm has employed separate counsel, Milo Steven Marsden and the law firm of Bendinger, Crockett, Peterson & Casey, PC (collectively, "BCP&C"), to defend her in the SEC Action and the Related Proceedings. BCP&C has also represented Strohm in connection with the negotiation and drafting of this Agreement.

F. Strohm has made various demands on the Company for indemnification and for advancement of the attorneys' fees and costs she has incurred to date, as well as the attorneys' fees and costs she may subsequently incur, in connection with the SEC Action and the Related Proceedings and has provided the Company with written undertakings, dated August 29, 2003 and September 3, 2003, in conformity with the requirements of Utah Code Ann. § 16-10a-904.

G. ClearOne referred Strohm's demands for indemnification to its Special Litigation Committee ("SLC") comprised of two independent directors. The SLC reviewed those demands, as well as similar demands for indemnification made by other present or former officers and directors of the Company, in conjunction with its investigation of the various claims asserted in the multiple shareholder derivative actions filed against certain of the Company's present and former officers and directors, including Strohm. On October 13, 2003, the SLC completed its investigation concerning the derivative actions and the indemnification demands and issued its reports to the Company wherein it concluded, inter alia, that pursuing the derivative actions was not in the best interest of the Company and that the Company should attempt to negotiate a

settlement of Strohm's indemnification demands in the context of negotiating a global settlement of all potential claims and counterclaims between the Company and Strohm. In reliance on the SLC's conclusions and recommendations, the Company has moved to dismiss the derivative actions pursuant to Utah Code Ann. § 16-10a-740(4)(a) and has negotiated this Agreement with Strohm.

H. Strohm and ClearOne desire to resolve any and all disputes that may exist between them, whether known or unknown, including, but not limited to, disputes regarding Strohm's demand for indemnification, disputes relating to Strohm's employment with ClearOne, and disputes relating to the termination of that employment relationship.

**AGREEMENT**

NOW, THEREFORE, in consideration of the mutual promises, covenants, warranties, and agreements set forth herein, the Parties mutually agree as follows:

1. Effective Date. This Agreement is effective on the eighth day following Strohm's signing of this Agreement, provided that Strohm does not revoke her execution of this Agreement as provided in Paragraph 19 below.

2. Receipt of this Agreement. Strohm acknowledges that she received a copy of this Agreement on December 2, 2003, and that she has 21 days from the receipt of this Agreement in which to consider and consult with an attorney regarding this Agreement. Strohm further acknowledges that she has had an adequate amount of time in which to consult with BCP&C, her counsel of choice, with respect to the contents of this Agreement prior to signing.

3. Payment to Strohm. Upon the expiration of the revocation period described in Paragraph 19 below and the unrevoked signing of this Agreement by Strohm, ClearOne shall pay Strohm the sum of $75,000. The Parties acknowledge and agree that this payment is being made in consideration of, inter alia, the Company's purchase of Strohm's shares of the Company's common stock, the Company's cancellation of Strohm's options to purchase additional shares of the Company's common stock, and the release of all claims that Strohm may have against the Company, all as more fully stated in Paragraphs 5, 6, and 9 below. The Parties also acknowledge and agree that the Company is not responsible for the withholding of any federal or state taxes from said payment and that Strohm is responsible for paying any taxes that may become due and owing as a result of her receipt of said payment.

4. Resignation of Employment. Strohm hereby resigns her employment with ClearOne effective December 5, 2003.

5. Cancellation of Stock Options. As partial consideration for the payment specified in Paragraph 3 above, upon the expiration of the revocation period described in Paragraph 19 below and the unrevoked signing of this Agreement by Strohm, all unexercised stock options acquired by Strohm during her employment with the Company, whether vested or unvested, shall immediately be deemed cancelled. Strohm represents and warrants that, immediately prior to the effective date of this Agreement, she holds vested and unvested stock options entitling her to purchase up to a total of 268,464 shares of the Company's common stock and that 171,963 of these options are vested. Strohm further agrees that all of her rights, entitlements, and benefits

under the 1990 Gentner Stock Option Plan and the 1998 ClearOne Stock Option Plan, including any agreements entered into in relation to the foregoing plans, are hereby terminated and cancelled.

6. Transfer of Stock. As partial consideration for the payment specified in Paragraph 3 above, upon the expiration of the revocation period described in Paragraph 19 below and the unrevoked signing of this Agreement by Strohm, Strohm shall transfer, assign, and sell to the Company 15,500 shares of the Company's common stock.

7. Cooperation in Related Proceedings. Strohm shall cooperate with the Company and its counsel in the defense and/or prosecution of the SEC Action and the Related Proceedings. Strohm's cooperation shall include, but shall not be limited to, voluntarily providing deposition and trial testimony, meeting with the Company and its counsel for the purpose of preparing for depositions or trial proceedings, and providing information and documents to the Company or its counsel in connection with the defense and/or prosecution of the SEC Action and the Related Proceedings. With respect to any request by the Company and/or its counsel for deposition or trial testimony, meetings, information, or documents, the Company shall give reasonable notice to Strohm of its request, including the time and place of the deposition, trial, or meeting, and shall reimburse Strohm for all reasonable expenses incurred by her, including reasonable attorneys' fees and costs, in providing the requested cooperation.

8. Indemnification. Subject to the limitations imposed by Utah Code Ann. § 16-10a-902 and the Company's articles of incorporation and bylaws, and also subject to the undertakings referred to in Recital F above, ClearOne shall indemnify Strohm for any liability and for all reasonable attorneys' fees and costs incurred by her in connection with the SEC Action or any Related Proceedings, whether incurred before or after the effective date of this Agreement. The Company's duty to indemnify Strohm is further conditioned upon Strohm's fulfillment of her duty under Paragraph 7 above to cooperate with the Company and its counsel in connection with the SEC Action and Related Proceedings.

9. Release of Claims by Strohm. Strohm, on behalf of herself and her heirs and assigns, hereby completely releases and discharges ClearOne and all of ClearOne's predecessors, successors, parents, subsidiaries, and affiliates, and all of their respective present and former directors, officers, employees, attorneys and agents (hereinafter collectively referred to as "Releasees") from any and all existing claims and causes of action of every kind and nature, whether presently known or unknown by the Parties, including but not limited to any claims or causes of action for breach of implied or express contract, libel, slander, wrongful discharge or termination, discrimination claims under the Age Discrimination in Employment Act and/or Older Workers Benefit Protection Act, Title VII of the Civil Rights Act of 1964, as amended, the Utah Antidiscrimination Act, local laws prohibiting age, race, religion, sex, national origin, disability and other forms of discrimination, or any other federal or state law that may be applicable thereto, claims growing out of any legal restrictions on ClearOne's right to terminate its employees, any tort claim or other claim arising in any way out of the employment relationship between Strohm and ClearOne or the termination of that relationship. Strohm specifically waives any and all claims for back pay, front pay, or any other form of compensation for services, except as set forth herein.

Except as expressly stated in Paragraph 8 above, Strohm hereby waives any right to recover damages, costs, attorneys' fees, and any other relief in any proceeding or action brought against ClearOne by any other party, including without limitation the Equal Employment Opportunity Commission and the Utah Antidiscrimination and Labor Division, on Strohm's behalf asserting any claim, charge, demand, grievance, or cause of action released by Strohm as stated above.

Notwithstanding the foregoing, Strohm does not waive rights, if any, Strohm may have to unemployment insurance benefits or workers' compensation benefits. Nothing in this Paragraph 9 prohibits Strohm from paying COBRA premiums to maintain Strohm's participation, if any, in ClearOne's group health plan to the extent allowed by law and by the terms, conditions, and limitations of the health plan.

10. Release of Claims by ClearOne. Except for any claim as to which indemnification is not allowed by Utah Code Ann. § 16-10a-902 and any claim that may accrue under the undertakings referenced in Recital F above, ClearOne, on behalf of itself and its successors and assigns, hereby completely releases and discharges Strohm from all existing claims and causes of action of any kind and nature, whether presently known or unknown by the Parties, including but not limited to any claims or causes of action arising out of or relating to Strohm's employment with ClearOne.

11. No Assignment of Claims. Strohm represents and warrants that she has not previously assigned or transferred, or attempted to assign or transfer, to any third party, any of the claims waived and released herein.

12. No Claim Filed. Strohm represents that she has not filed any claim, complaint, charge, or lawsuit against ClearOne or any other Releasee with any governmental agency or any state or federal court, and covenants not to file any lawsuit at any time hereafter for any matter, claim, or incident known or unknown which occurred or arose out of occurrences prior to the date hereof.

13. No Admission of Liability. This Agreement does not constitute an admission of any fault, liability, or wrongdoing by any Releasee, nor an admission that Strohm has any claim whatsoever against ClearOne or any other Releasee. ClearOne and all other Releasees specifically deny having any liability to Strohm or having committed any wrongful acts against Strohm. This Agreement does not constitute an admission of any fault, liability, or wrongdoing by Strohm, nor an admission that ClearOne has any claim against Strohm. Strohm specifically denies having any liability to ClearOne or having committed any wrongful acts against ClearOne.

14. Additional Consideration. Strohm acknowledges and agrees that as of the date she signs this Agreement, ClearOne has paid to Strohm (a) all compensation for wages earned, less normal payroll deductions, (b) all amounts due for earned vacation pay less normal payroll deductions, and (c) all other amounts due and owing to Strohm by ClearOne. Strohm agrees and acknowledges that the sums paid pursuant to this Agreement are in addition to any sums or payments to which Strohm would be entitled but for the signing of this Agreement.

15. Conditions Subsequent. This Agreement is conditioned upon Strohm signing settlement documents in the SEC Action by December 5, 2003, and upon the final approval of the settlement of the SEC Action, as it applies to Strohm, by January 31, 2004. If for any reason Strohm fails to satisfy either of these conditions, this Agreement will automatically become null and void, and the Parties shall forthwith return to each other any and all consideration received by them pursuant to this Agreement.

16. Integration Clause. This Agreement contains the entire agreement and understanding of ClearOne and Strohm concerning the subject matter hereof, and except as expressly noted herein, this Agreement supersedes and replaces all prior negotiations, proposed agreements, agreements or representations whether written or oral concerning the subject matter hereof. ClearOne and Strohm agree and acknowledge that neither ClearOne or Strohm, nor any agent or attorney of either, has made any representation, warranty, promise or covenant whatsoever, express or implied, not contained in this Agreement, to induce the other to execute this Agreement. No amendment, alteration, or modification of this Agreement shall be effective unless made in writing and signed by both Parties.

17. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Utah, without giving effect to Utah's choice of law rules.

18. Voluntary and Knowing Signing. Strohm acknowledges that she has read this Agreement carefully and fully understands this Agreement and that she has consulted with her attorney, BCP&C, prior to signing this Agreement. Strohm acknowledges that she has executed this Agreement voluntarily and of her own free will and that she is knowingly and voluntarily releasing and waiving all claims she may have against Releasees, including ClearOne.

19. Revocation Period. Strohm has seven (7) days from the date on which she signs this Agreement to revoke this Agreement by providing written notice, by mail, hand delivery, or facsimile, of her revocation to:

Raymond J. Etcheverry
Parsons Behle & Latimer
Counsel for ClearOne
201 South Main Street
Suite 1800
Salt Lake City, Utah 84111
Facsimile: (801) 536-6111

Strohm's revocation, to be effective, must be received by the above-named person by the end of the seventh day after Strohm signs this Agreement. This Agreement becomes effective on the eighth day after Strohm signs this Agreement, providing that Strohm has not revoked this Agreement as provided above.

IN WITNESS WHEREOF, the Parties have executed this Agreement on the dates indicated below.

CLEARONE COMMUNICATIONS, INC.

Dated: 12/5/03

By: _____

Its: CEO

Dated: 12/2/03

_____
SUSIE S. STROHM

# EXHIBIT 7

**²circle** *vb* **cir·cled; cir·cling** \-k(ə-)liŋ\ *vt* (14c) **1** : to enclose in or as if in a circle **2** : to move or revolve around ~ *vi* **1 a** : to move in or as if in a circle **b** : CIRCULATE **2** : to describe or extend in a circle — **cir·cler** \-k(ə-)lər\ *n*

**circle graph** *n* (1928) : a circular chart cut by radii into segments illustrating relative magnitudes or frequencies — called also *pie chart*

**cir·clet** \'sər-klət\ *n* (15c) : a little circle; *esp* : a circular ornament

**¹cir·cuit** \'sər-kət\ *n, often attrib* [ME, fr. MF *circuite*, fr. L *circuitus*, fr. pp. of *circumire, circuire* to go around, fr. *circum-* + *ire* to go — more at ISSUE] (14c) **1 a** : a usu. circular line encompassing an area **b** : the space enclosed within such a line **2 a** : a course around a periphery **b** : a circuitous or indirect route **3 a** : a regular tour (as by a traveling judge or preacher) around an assigned district or territory **b** : the route traveled **c** : a group of church congregations ministered to by one pastor **4 a** : the complete path of an electric current including usu. the source of electric energy **b** : an assemblage of electronic elements : HOOKUP **c** : a two-way communication path between points (as in a computer) **5 a** : an association of similar groups : LEAGUE **b** : a number or series of public outlets (as theaters, radio shows, or arenas) offering the same kind of presentation **c** : a number of similar social gatherings ⟨cocktail ~⟩ — **circuit·al** \-kət-ᵊl\ *adj*

**²circuit** *vt* (15c) : to make a circuit about ~ *vi* : to make a circuit

**circuit breaker** *n* (1872) : a switch that automatically interrupts an electric circuit under an infrequent abnormal condition

**circuit court** *n* (1708) : a court that sits at two or more places within one judicial district

**circuit judge** *n* (1801) : a judge who holds a circuit court

**cir·cu·itous** \(ˌ)sər-ˈkyü-ət-əs\ *adj* (1664) **1** : not being forthright or direct in language or action **2** : having a circular or winding course ⟨a ~ route⟩ — **cir·cu·itous·ly** *adv* — **cir·cu·itous·ness** *n*

**circuit rider** *n* (1837) : a clergyman assigned to a circuit esp. in a rural area

**cir·cuit·ry** \'sər-kə-trē\ *n, pl* **-ries** (1946) **1** : the detailed plan of an electric circuit **2** : the components of an electric circuit

**cir·cu·ity** \(ˌ)sər-ˈkyü-ət-ē\ *n, pl* **-ities** [irreg. fr. *circuit*] (1626) : lack of straightforwardness : INDIRECTION ⟨mired so deeply in its own complicated ~ of words —C. O. Gregory⟩

**¹cir·cu·lar** \'sər-kyə-lər\ *adj* [ME *circuler*, fr. MF, fr. LL *circularis*, fr. L *circulus* circle] (15c) **1 a** : having the form of a circle : ROUND **b** : moving in or describing a circle or spiral **2 a** : of or relating to a circle or its mathematical properties ⟨a ~ arc⟩ **b** : having a circular base or bases ⟨a ~ cylinder⟩ **3** : CIRCUITOUS, INDIRECT ⟨a ~ explanation⟩ **4** : being or involving reasoning that uses in the argument or proof a conclusion to be proved or one of its unproved consequences **5** : marked by or moving in a cycle **6** : intended for circulation — **cir·cu·lar·i·ty** \ˌsər-kyə-ˈlar-ət-ē\ *n* — **cir·cu·lar·ly** \'sər-kyə-lər-lē\ *adv* — **cir·cu·lar·ness** *n*

**²circular** *n* (1789) : a paper (as a leaflet) intended for wide distribution

**circular dichroism** *n* (ca. 1961) **1** : the property (as of an optically active medium) of unequal absorption of right and left plane-polarized light so that the emergent light is elliptically polarized **2** : a spectroscopic technique that makes use of circular dichroism

**circular file** *n* (1967) : WASTEBASKET

**circular function** *n* (1884) : TRIGONOMETRIC FUNCTION

**cir·cu·lar·ize** \'sər-kyə-lə-ˌrīz\ *vt* **-ized; -iz·ing** (1848) **1 a** : to send circulars to **b** : to poll by questionnaire **2** : PUBLICIZE — **cir·cu·lar·iza·tion** \ˌsər-kyə-lə-rə-ˈzā-shən\ *n*

**circular saw** *n* (1817) : a power saw with a circular cutting blade; *also* : the blade itself

**cir·cu·late** \'sər-kyə-ˌlāt\ *vb* **-lat·ed; -lat·ing** [L *circulatus*, pp. of *circulare*, fr. *circulus*] *vi* (1650) **1** : to move in a circle, circuit, or orbit; *esp* : to follow a course that returns to the starting point ⟨blood ~s through the body⟩ **2** : to pass from person to person or place to place: as **a** : to flow without obstruction **b** : to become well-known or widespread ⟨rumors *circulated* through the town⟩ **c** : to go from group to group at a social gathering **d** : to come into the hands of readers; *specif* : to become sold or distributed ~ *vt* : to cause to circulate — **cir·cu·lat·able** \-ˌlāt-ə-bəl\ *adj* — **cir·cu·la·tive** \-ˌlāt-iv\ *adj* — **cir·cu·la·tor** \-ˌlāt-ər\ *n*

**circulating decimal** *n* (1768) : REPEATING DECIMAL

**cir·cu·la·tion** \ˌsər-kyə-ˈlā-shən\ *n* (1654) **1** : orderly movement through a circuit; *esp* : the movement of blood through the vessels of the body induced by the pumping action of the heart **2** : FLOW **3 a** : passage or transmission from person to person or place to place; *esp* : the interchange of currency ⟨coins in ~⟩ **b** : the extent of dissemination: as (1) : the average number of copies of a publication sold over a given period (2) : the total number of items borrowed from a library

**cir·cu·la·to·ry** \'sər-kyə-lə-ˌtōr-ē, -ˌtȯr-\ *adj* (1605) : of or relating to circulation or the circulatory system ⟨~ failure⟩

**circulatory system** *n* (1862) : the system of blood, blood vessels, lymphatics, and heart concerned with the circulation of the blood and lymph

**circum-** *prefix* [OF or L; OF, fr. L, fr. *circum*, fr. *circus* circle — more at CIRCLE] : around : about ⟨*circum*polar⟩

**cir·cum·am·bi·ent** \ˌsər-kə-ˈmam-bē-ənt\ *adj* [LL *circumambient-, circumambiens*, prp. of *circumambire* to surround in a circle, fr. L *circum-* + *ambire* to go around — more at AMBIENT] (1633) : being on all sides : ENCOMPASSING — **cir·cum·am·bi·ent·ly** *adv*

**cir·cum·am·bu·late** \-byə-ˌlāt\ *vt* **-lat·ed; -lat·ing** [LL *circumambulatus*, pp. of *circumambulare*, fr. L *circum-* + *ambulare* to walk] (ca. 1656) : to circle on foot esp. ritualistically — **cir·cum·am·bu·la·tion** \-ˌmam-byə-ˈlā-shən\ *n*

**cir·cum·cen·ter** \'sər-kəm-ˌsent-ər\ *n* (ca. 1889) : the point at which the perpendicular bisectors of the sides of a triangle intersect and which is equidistant from the three vertices

**cir·cum·cir·cle** \-ˌsər-kəl\ *n* (1885) : a circle which passes through all the vertices of a polygon (as a triangle)

**cir·cum·cise** \'sər-kəm-ˌsīz\ *vt* **-cised; -cis·ing** [ME *circumcisen*, fr. L *circumcisus*, pp. of *circumcidere*, fr. *circum-* + *caedere* to cut — more at CONCISE] (13c) : to cut off the prepuce of (a male) or the clitoris of (a female) — **cir·cum·cis·er** *n*

**cir·cum·ci·sion** \ˌsər-kəm-ˈsizh-ən, ˈsər-kəm-ˌ\ *n* (12c) **1 a** : the act of circumcising; *specif* : a Jewish rite performed on male infants as a sign of inclusion in the Jewish religious community **b** : the condition of being circumcised **2** *cap* : January 1 observed as a church festival in commemoration of the circumcision of Jesus

**cir·cum·fer·ence** \sə(r)-ˈkəm(p)-fərn(t)s, -f(ə-)rən(t)s\ *n* [ME, fr. MF, fr. L *circumferentia*, fr. *circumferre* to carry around, fr. *circum-* + *ferre* to carry — more at BEAR] (14c) **1** : the perimeter of a circle **2** : the external boundary or surface of a figure or object : PERIPHERY — **cir·cum·fer·en·tial** \-ˌkəm(p)-fə-ˈren-chəl\ *adj*

**¹cir·cum·flex** \'sər-kəm-ˌfleks\ *adj* [L *circumflexus*, pp. of *circumflectere* to bend around, mark with a circumflex, fr. *circum-* + *flectere* to bend] (1577) **1** : characterized by the pitch, quantity, or quality indicated by a circumflex **2** : marked with a circumflex

**²circumflex** *n* (1609) : a mark ^, ˆ, or ˜ orig. used in Greek over long vowels to indicate a rising-falling tone and in other languages to mark length, contraction, or a particular vowel quality

**cir·cum·flu·ent** \(ˌ)sər-ˈkəm-flə-wənt, ˌsər-kəm-ˈflü-ənt\ *adj* [fr. L *circumfluent-, circumfluens*, prp. of *circumfluere* to flow around, fr. *circum-* + *fluere* to flow] (1577) : flowing round or surrounding in the manner of a fluid — **cir·cum·flu·ous** \(ˌ)sər-ˈkəm-flə-wəs\ *adj*

**cir·cum·fuse** \ˌsər-kəm-ˈfyüz\ *vt* **-fused; -fus·ing** [L *circumfusus*, pp. of *circumfundere* to pour around, fr. *circum-* + *fundere* to pour — more at FOUND] (1605) : SURROUND, ENVELOP — **cir·cum·fu·sion** \-ˈfyü-zhən\ *n*

**cir·cum·ja·cent** \ˌsər-kəm-ˈjās-ᵊnt\ *adj* [L *circumjacent-, circumjacens*, prp. of *circumjacēre* to lie around, fr. *circum-* + *jacēre* to lie — more at ADJACENT] (15c) : lying adjacent on all sides : SURROUNDING

**cir·cum·lo·cu·tion** \ˌsər-kəm-lō-ˈkyü-shən\ *n* [L *circumlocution-, circumlocutio*, fr. *circum-* + *locutio* speech, fr. *locutus*, pp. of *loqui* to speak] (15c) **1** : the use of an unnecessarily large number of words to express an idea **2** : evasion in speech — **cir·cum·loc·u·to·ry** \-ˈläk-yə-ˌtōr-ē, -ˌtȯr-\ *adj*

**cir·cum·lu·nar** \ˌsər-kəm-ˈlü-nər\ *adj* (ca. 1909) : revolving about or surrounding the moon

**cir·cum·nav·i·gate** \-ˈnav-ə-ˌgāt\ *vt* [L *circumnavigatus*, pp. of *circumnavigare* to sail around, fr. *circum-* + *navigare* to navigate] (1634) : to go completely around (as the earth) esp. by water; *also* : to go around instead of through : BYPASS ⟨~ a congested area⟩ — **cir·cum·nav·i·ga·tion** \-ˌnav-ə-ˈgā-shən\ *n* — **cir·cum·nav·i·ga·tor** \-ˈnav-ə-ˌgāt-ər\ *n*

**cir·cum·po·lar** \ˌsər-kəm-ˈpō-lər\ *adj* (1686) **1** : continually visible above the horizon ⟨a ~ star⟩ **2** : surrounding or found in the vicinity of a terrestrial pole

**cir·cum·scis·sile** \-ˈsis-əl, -ˌīl\ *adj* [L *circumscissus*, pp. of *circumscindere* to tear around, fr. *circum-* + *scindere* to cut, split — more at SHED] (1835) : dehiscing by fissure around the capsule of the fruit

**cir·cum·scribe** \'sər-kəm-ˌskrīb\ *vt* [L *circumscribere*, fr. *circum-* + *scribere* to write, draw — more at SCRIBE] (1835) **1 a** : to constrict the range or activity of definitely and clearly **b** : to define or mark off carefully **2 a** : to draw a line around **b** : to surround by a boundary **3** : to construct or be constructed around (a geometrical figure) so as to touch as many points as possible *syn* see LIMIT

**cir·cum·scrip·tion** \ˌsər-kəm-ˈskrip-shən\ *n* [L *circumscription-, circumscriptio*, fr. *circumscriptus*, pp. of *circumscribere*] (1531) **1** : the act of circumscribing : the state of being circumscribed: as **a** : DEFINITION, DELIMITATION **b** : LIMITATION **2** : something that circumscribes: as **a** : LIMIT, BOUNDARY **b** : RESTRICTION **3** : a circumscribed area or district

**cir·cum·spect** \'sər-kəm-ˌspekt\ *adj* [ME, fr. MF or L; MF *circonspect*, fr. L *circumspectus*, fr. pp. of *circumspicere* to look around, be cautious, fr. *circum-* + *specere* to look — more at SPY] (15c) : careful to consider all circumstances and possible consequences : PRUDENT *syn* see CAUTIOUS — **cir·cum·spec·tion** \ˌsər-kəm-ˈspek-shən\ *n* — **cir·cum·spect·ly** \'sər-kəm-ˌspek-tlē\ *adv*

**cir·cum·stance** \'sər-kəm-ˌstan(t)s, -stən(t)s\ *n* [ME, fr. OF, fr. L *circumstantia*, fr. *circumstant-, circumstans*, prp. of *circumstare* to stand around, fr. *circum-* + *stare* to stand — more at STAND] (13c) **1 a** : a condition, fact, or event accompanying, conditioning, or determining another : an essential or inevitable concomitant ⟨the weather is a ~ to be taken into consideration⟩ **b** : a subordinate or accessory fact or detail ⟨cost is a minor ~ in this case⟩ **c** : a piece of evidence that indicates the probability or improbability of an event (as a crime) ⟨the ~s of the missing weapon told against him⟩ ⟨the ~s suggest murder⟩ **2 a** : the sum of essential and environmental factors (as of an event or situation) ⟨constant and rapid change in economic ~ —G. M. Trevelyan⟩ **b** : state of affairs : EVENTUALITY ⟨open rebellion was a rare ~⟩ — often used in pl. ⟨a victim of ~s⟩ **c** *pl* : situation with regard to wealth ⟨he was in easy ~s⟩ **3** : attendant formalities and ceremonial ⟨pride, pomp, and ~ of glorious war —Shak.⟩ **4** : an event that constitutes a detail (as of a narrative or course of events) ⟨considering each ~ in turn⟩ *syn* see OCCURRENCE

**cir·cum·stanced** \-ˌstan(t)st, -stən(t)st\ *adj* (1611) : placed in particular circumstances esp. in regard to property or income

**cir·cum·stan·tial** \ˌsər-kəm-ˈstan-chəl\ *adj* (1600) **1** : belonging to, consisting in, or dependent on circumstances **2** : pertinent but not essential : INCIDENTAL **3** : marked by careful attention to detail : abounding in factual details ⟨a ~ account of the fight⟩ **4** : CEREMONIAL — **cir·cum·stan·ti·al·i·ty** \-ˌstan-chē-ˈal-ət-ē\ *n* — **cir·cum·stan·tial·ly** \-ˈstanch-(ə-)lē\ *adv*

*syn* CIRCUMSTANTIAL, MINUTE, PARTICULAR, DETAILED mean dealing with a matter fully and usu. point by point. CIRCUMSTANTIAL implies fullness of detail that fixes something described in time and space ⟨a *circumstantial* account of our visit⟩ MINUTE implies close and searching attention to the smallest details ⟨a *minute* examination of a fossil⟩ PARTICULAR implies a precise attention to every detail ⟨a *particular* description of the scene of the crime⟩ DETAILED stresses abundance or completeness of detail ⟨a *detailed* analysis of the event⟩

**circumstantial evidence** *n* (1736) : evidence that tends to prove a fact by proving other events or circumstances which afford a basis for a reasonable inference of the occurrence of the fact at issue

**cir·cum·stan·ti·ate** \ˌsər-kəm-ˈstan-chē-ˌāt\ *vt* **-at·ed; -at·ing** (ca. 1652) : to supply with circumstantial evidence or support

**cir·cum·stel·lar** \ˌsər-kəm-ˈstel-ər\ *adj* (1951) : surrounding or occurring in the vicinity of a star

# EXHIBIT 8

LEXSEE

**KATHLEEN GATES, Individually, as Next of Kin and as Personal Representative of the Estate of RUFUS GATES; FREDERICK GATES and KEVIN GATES, as Next of Kin, through their Next Friend, KATHLEEN GATES; MARKEITH MCCOY, through his Next Friend, YVONNE MCCOY, Plaintiffs-Appellants, v. THE CITY OF MEMPHIS, CITY OF MEMPHIS POLICE DEPARTMENT, WALTER J. WINFREY, Individually and in his official capacity as DIRECTOR OF THE CITY OF MEMPHIS POLICE DEPARTMENT; OFFICER ABDUL SHAFEEQ MUHAMMAD, Jointly and Severally, Defendants-Appellees.**

**No. 98-5921**

**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

**2000 U.S. App. LEXIS 6713**

**April 6, 2000, Filed**

**NOTICE:** [*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

**SUBSEQUENT HISTORY:** Reported in Table Case Format at: 2000 U.S. App. LEXIS 13065.

**PRIOR HISTORY:** ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE. 95-02949. McCalla. 5-28-98.

**DISPOSITION:** AFFIRMED.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant, a deceased policeman's wife, challenged the Shelby County Circuit Court (Tennessee) judgment for appellee policeman on appellant's claims under 42 U.S.C.S. § 1983 and state claims arising out of the shooting death of her husband by appellee.

**OVERVIEW:** Appellant's husband, a policeman, was killed by appellee policeman, during an incident while deceased was off-duty. Appellant challenged appellee's judgment on her state wrongful death and federal civil rights claims. The court affirmed. Exclusion of appellant's expert witness testimony was not erroneous because his expertise was in crime scene reconstruction, but his proffered testimony was on trajectory analysis. The probative value of decedent's dying declarations was not substantially outweighed by prejudice or confusion because the issue at trial was whether appellee's use of deadly force was objectively reasonable and decedent's statements that it was decedent's fault and that appellee did not know decedent was a police officer were relevant. Appellee's testimonial inconsistencies did not undermine his consistent theme that he shot decedent in self-defense. Substantial evidence supported the findings of the jury and the trial court that appellee's use of deadly force was objectively reasonable.

**OUTCOME:** Judgment was affirmed. Exclusion of expert testimony was not erroneous because witness's expertise was in crime scene reconstruction, not trajectory analysis; the probative value of relevant dying declarations outweighed potential prejudice; and substantial evidence existed to support that appellee's use of deadly force was objectively reasonable.

**LexisNexis(R) Headnotes**

***Civil Procedure > Appeals > Standards of Review > Abuse of Discretion***
***Evidence > Procedural Considerations > Rulings on Evidence***

*Evidence > Testimony > Experts > Admissibility*
[HN1]A trial court's decision to admit or exclude expert testimony is reviewed under the abuse of discretion standard.

*Civil Procedure > Trials > Jury Trials > Province of Court & Jury*
*Evidence > Scientific Evidence > Daubert Standard*
*Evidence > Testimony > Experts > Daubert Standard*
[HN2]Fed. R. Evid. 702 assigns to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.

*Evidence > Testimony > Experts > General Overview*
[HN3]The issue with regard to the admission of expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question.

*Civil Procedure > Appeals > Reviewability > Preservation for Review*
*Evidence > Procedural Considerations > Objections & Offers of Proof > Timeliness*
*Evidence > Procedural Considerations > Rulings on Evidence*
[HN4]Error may not be predicated upon a ruling which admits evidence unless a substantial right of the party is affected and a timely objection or motion to strike appears of record. Fed. R. Evid. 103(a)(1).

*Civil Procedure > Appeals > Standards of Review > Abuse of Discretion*
*Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Evidence*
*Evidence > Relevance > Confusion, Prejudice & Waste of Time*
[HN5]Assuming the issue of admission of evidence is preserved for appeal, the court applies an abuse of discretion standard to the trial court's admission of the evidence, to its determinations of relevancy, and to its balancing of the potentially unfair prejudicial impact of evidence against its probative value.

*Civil Procedure > Appeals > Standards of Review > Abuse of Discretion*
*Evidence > Relevance > Confusion, Prejudice & Waste of Time*
[HN6]In reviewing the trial court's decision on the issue of the admission of dying declarations, the appellate court looks at the evidence in a light most favorable to its proponent, maximizing its probative value and, minimizing its effect of confusing the jury.

*Civil Procedure > Appeals > Standards of Review > Substantial Evidence > General Overview*
[HN7]A jury's verdict on a federal civil rights claim is entitled to substantial deference.

*Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review*
[HN8]The trial court's findings on a state wrongful death claim are entitled to substantial deference. A trial court's findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. Fed. R. Civ. P. 52(a). If the trial court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact it would have weighed the evidence differently.

*Civil Procedure > Appeals > Standards of Review > Substantial Evidence > General Overview*
[HN9]In reviewing an appeal based on insufficiency of the evidence the appellate court may neither weigh the evidence, pass on the credibility of the witnesses, nor substitute its judgment for that of the jury or the trial court. Instead, the court must view the evidence in the light most favorable to the appellees, drawing all reasonable inferences in their favor.

**COUNSEL:** For KATHLEEN GATES, FREDERICK GATES, KEVIN GATES, MARKEITH MCCOY, Plaintiffs - Appellants: Ernest L. Jarrett, Detroit, MI.

For THE CITY OF MEMPHIS, CITY OF MEMPHIS POLICE DEPARTMENT, WALTER J. WINFREY, Defendants - Appellees: Henry L. Klein, Apperson, Crump & Maxwell, Memphis, TN.

For ABDUL SHAFEEQ MUHAMMAD, Defendant - Appellee: Alan Bryant Chambers, Handel R. Durham, Jr., Parson Khumalo Law Firm, Memphis, TN.

**JUDGES:** BEFORE: COLE and CLAY, Circuit Judges; BELL *, District Judge.

* Honorable Robert Holmes Bell, United States District Judge for the Western District of Michigan, sitting by designation.

**OPINION**

**PER CURIAM.** This case arises out of the tragic fatal shooting of an off-duty police officer [*2] by a fellow police officer.

On November 4, 1994, Major Rufus Gates, an off-duty member of the Memphis Police Department, dressed in civilian clothing, was driving east on McClure Street with his sons and nephew when his vehicle was struck by a Jeep [1] occupied by several youths. The Jeep pulled up alongside Gates' vehicle, blocking the oncoming traffic. An argument ensued between Gates and the occupants of the Jeep. Gates retrieved his gun from under the seat and exited his car. As the Jeep began to drive away, Gates ran after it, carrying his gun.

1 Although there was some dispute about the make of this vehicle, for ease of reference it will be referred to as a Jeep.

At some point during this altercation, Memphis Police Officer Abdul Shafeeq Muhammad, who was driving a marked police vehicle, pulled up behind Gates' vehicle. When the Jeep drove away, Gates rapidly approached the police vehicle with his gun in his hand. Muhammad fired his service revolver at Gates. Gates died from his wounds.

The wife, sons, [*3] and nephew of Major Gates filed this action in the Circuit Court for Shelby County, Tennessee, against the City of Memphis, City of Memphis Police Department, Police Director Walter J. Winfrey and Officer Muhammad, seeking damages pursuant to 42 U.S.C. § 1983 for deprivations of rights secured by the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and state claims arising out of the shooting death of Gates. Defendants removed the action to the United States District Court for the Western District of Tennessee. Prior to trial, the district court dismissed Defendants City of Memphis Police Department and Director Walter J. Winfrey from the case. The district court also dismissed Plaintiffs Frederick Gates, Kevin Gates and Markeith McCoy without prejudice pursuant to Plaintiffs' motion.

Following an 11-day trial, the jury returned a verdict for Defendant Muhammad on Plaintiff's civil rights claims against him. In light of this finding the jury did not consider the derivative claims against the City. Thereafter the parties submitted findings of fact and conclusions of law on the state wrongful death claim for the district court's consideration. [*4] The district court found that Defendant Muhammad perceived Gates as presenting a threat sufficient to justify the use of deadly force, and that this perception was objectively reasonable. Accordingly, the district court found for Defendant Muhammad on Plaintiff's state wrongful death claim. Having determined Defendant Muhammad's conduct was not negligent, the trial court also found for Defendant City of Memphis on Plaintiff's state wrongful death claim.

Plaintiff-Appellant Kathleen Gates filed this appeal, requesting that the jury verdict on the civil rights claims be set aside and the matter remanded for a new trial, and that the trial court's judgment on the state law claims be vacated and judgment entered in her favor.

I.

Appellant's first assignment of error concerns the trial court's ruling that Appellant could not use leading questions on direct examination of a witness identified with an adverse party. Rule 611(c) of the Federal Rules of Evidence provides that leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. FED. R. EVID. 611(c). However, the last sentence of Rule 611(c) provides [*5] that "when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions." *Id.*

Appellant called Mary Overton Jackson on direct examination. When the district court objected to the use of leading questions, Appellant's counsel requested that she be deemed an adverse witness because she was a member of the police department and was the lead investigator responsible for making the departmental determination that the defendant's use of deadly force was justified, a position adverse to the Appellants.

The district court initially declined to designate Jackson as an adverse witness. The district court noted that because Gates was a very well respected member of the police department, and because both sides of the case would be calling members of the police department, it did not make sense under the circumstances to designate every member of the police department as an adverse witness without evidence of their adverse position. After further testimony from Jackson regarding her role in authoring the report of the internal investigation, the district court reexamined the issue and determined that Appellant [*6] could use leading questions on her direct examination of Overton.

Although the last sentence of Rule 611(c) provides that certain categories of witnesses can automatically be treated as hostile, the rule does not give the calling party an absolute right to ask leading questions even when the witness is identified with an adverse party. There may be instances where, although a witness is identified with the opposing party, he or she is also identified, because of sympathy or bias, with the calling party. In such cases the court has discretion to preclude the use of leading questions to avoid abuses of the rule. *See* WEINSTEIN'S

FEDERAL EVIDENCE, 2d ed. § 611.06[3], at 611-64 Vol 4 (1999). The use of leading questions during direct examination remains within the trial court's sound discretion, and we review that decision only to determine whether there has been a clear abuse of discretion. *Woods v. Lecureux*, 110 F.3d 1215, 1222 (6th Cir. 1997) (citing *Chonich v. Wayne County Community College*, 874 F.2d 359, 368 (6th Cir. 1989)).

We find no abuse of discretion in the district court's rulings regarding Appellant's method of questioning of Jackson. [*7] Where, as in this case, members of the police department were identified with both parties, the court properly favored the use of direct examination until such time as it became evident that a particular witness was in fact adverse.

In addition to the finding that there was no abuse of discretion, this Court observes that Appellant has not shown any specific manner in which she was prejudiced by the trial court's rulings regarding this witness. Appellant did eventually receive the ruling she requested and was permitted to question Jackson through leading questions. Appellant claims that by this time Jackson had been more evasive than she could have been, had she been required to answer leading questions, but Appellant has not suggested that the trial court prevented her from revisiting any particular line of questioning.

**II.**

Appellant contends that the trial court erred when it granted Defendants' motion to disqualify her expert witness, Mr. Rocky S. Stone.

[HN1]A trial court's decision to admit or exclude expert testimony is reviewed under the abuse of discretion standard. *General Electric v. Joiner*, 522 U.S. 136, 138-39, 139 L. Ed. 2d 508, 118 S. Ct. 512 (1997); [*8] *Morales v. American Honda Motor Co., Inc.*, 151 F.3d 500, 515 (6th Cir. 1998)(rejecting the three-part standard of review articulated in *Cook v. American S.S. Co.*, 53 F.3d 733, 738 (6th Cir. 1995)).

Mr. Stone is a former police officer who is now self-employed as a forensic consultant. He worked as a police officer for 19 years, the last 12 of which he was assigned to the criminalistic section, or crime lab, where he was assigned to the latent fingerprint and firearm tool mark units. He also participated in the reconstruction of shooting incidents. His education includes graduation from the police academy in 1973, some course work toward an unfinished degree in police science, and a number of courses and training seminars on crime scene investigation. He has had no post-secondary education in physics, anatomy or physiology.

Appellant offered Mr. Stone as an expert witness on the subject of trajectory analysis, which Mr. Stone defined as the examination of the path of a bullet. Mr. Stone testified that although he never received a block of training specifically devoted to trajectory analysis, trajectory analysis was covered in his course work on shooting [*9] scene investigations. He explained that trajectory analysis is not a discipline in and of itself, but is merely one small component of the analysis needed to reconstruct any shooting scene.

Appellant contends that the trial court's finding that Mr. Stone was not an expert in trajectory analysis erroneously ignored Mr. Stone's knowledge, skill, experience, training and education as a crime scene investigator and shooting reconstructionist, and his testimony that trajectory analysis was but one component of the overall area of his expertise.

[HN2]Rule 702 of the Federal Rules of Evidence assigns to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993). The objective of the *Daubert* gatekeeping requirement is "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152, 143 L. Ed. 2d 238, 119 S. Ct. 1167 (1999). [*10] As we noted in *Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir. 1994). "[HN3]the issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question."

In this case, the testimony Mr. Stone was prepared to give was not a general shooting scene reconstruction. As evidenced by Mr. Stone's Rule 26(a) expert report, he was being offered to give testimony on the specific subject of trajectory analysis. According to his report, Mr. Stone was prepared to testify on the probability of threat to Officer Muhammad based upon trajectory analysis. Given the focus of his proposed opinion testimony, it was not error for the court to consider his expertise in trajectory analysis, rather than his expertise in the general field of crime scene reconstruction.

In light of the fact that Mr. Stone had never received formal training in trajectory analysis, he had no post-secondary education in physics, anatomy or physiology, and he had made no measurements, and had done no scientific testing on this particular shooting scene, the district court did not abuse its discretion [*11] in excluding Mr. Stone's proposed expert testimony.

**III.**

Appellant contends that the trial court erroneously admitted two purported dying declarations of Major Gates.

Two off-duty Memphis Police Officers, Officer Harvey Edinborough, Jr., and Lieutenant Jerry A. Smith, came to Gates' side after the shooting. Edinborough testified that Gates asked who shot him, and then said "He didn't know I was an officer." On cross-examination Edinborough expressed uncertainty as to whether this comment was in the form of a statement or a question. Smith testified that Gates told him that he had his pistol in his hand when he approached the officer. Although he could not quote Gates verbatim, he testified that Gates said several times that it was not the officer's fault, that it was his fault that the shooting occurred.

Appellant does not dispute that these statements qualify under Rule 804(b)(2) as dying declarations. She contends, however, that the declarations should have been excluded from evidence because they were more prejudicial than probative. Appellant contends that the uncertainty about what Gates actually said, the uncertainty about what he meant, the comments' susceptibility [*12] to multiple interpretations and the fact that neither comment tends to support or refute the parties' positions relative to whether Gates ever pointed his gun at the Defendant, are all factors which prejudiced the Appellant, confused the issues, and misled the jury. [HN4]Error may not be predicated upon a ruling which admits evidence unless a substantial right of the party is affected and a timely objection or motion to strike appears of record. FED. R. EVID. 103(a)(1). Appellant did not object to the admission of these dying declarations at trial. They were, however, the subject of Appellant's pretrial motion in limine to exclude, which the trial court denied.

Because the standard of review to be applied on appeal is governed by whether the issue was preserved, this court must consider whether the motion in limine preserved the issue for appeal. [2]

> 2 Evidentiary issues that are not preserved are reviewed only for "plain error." FED. R. EVID. 103(d).

In *United States v. Kelly*, 204 F.3d 652, 2000 WL 205096 [*13] at *2 (6th Cir. 2000), we held that a motion in limine that was not ruled upon is not sufficient to preserve evidentiary questions for appeal. In contrast to *Kelly*, the trial court in this case did rule on the motion in limine prior to trial. Our analysis in *Kelly*, however, appears to be equally applicable, whether or not there has been a ruling on the motion in limine:

> As a matter of policy, the objection requirement of Fed.R.Evid. 103 is intended to allow the trial court to fix errors in its decision to admit or exclude evidence on the spot, thus preventing errors that could easily be alleviated without recourse to the appellate courts. A pre-trial motion in limine is not as effective a means of alerting the trial judge to evidentiary problems as a contemporaneous motion at trial.

*Id.* at *2 (quoting *Burger v. Western Kentucky Navigation, Inc.*, 1992 U.S. App. LEXIS 8268, No. 91-5221, 1992 WL 75219, at *3 (6th Cir.1992)). The pretrial motion in this case was undoubtedly less effective at alerting the trial judge to evidentiary problems than a contemporaneous motion at trial would have been.

Nevertheless, upon review, we conclude that we need not decide whether [*14] Appellant's motion in limine was sufficient to preserve the issue for appeal. It is clear in any event that the trial court's admission of the dying declarations meets the stricter standard of review that is applied to properly preserved evidentiary issues.

[HN5]Assuming the issue of the dying declarations was preserved for appeal, we apply an abuse of discretion standard to the district court's admission of the evidence, to its determinations of relevancy, and to its balancing of the potentially unfair prejudicial impact of evidence against its probative value. *United States v. Nash*, 175 F.3d 429, 434 (6th Cir. 1999). [HN6]In reviewing the district court's decision on this issue, we look at the evidence in a light most favorable to its proponent, maximizing its probative value and, minimizing its effect of confusing the jury. *Clarksville-Montgomery County School System v. U.S. Gypsum Co.*, 925 F.2d 993, 999 (6th Cir. 1991).

The issue at trial was whether Defendant Muhammad's use of deadly force was objectively reasonable. Gates' purported statements that it was his fault and that Muhammad did not know he was a police officer, are relevant to the issue of whether [*15] Muhammad reasonably believed that Gates posed a threat necessitating the use of deadly force. Appellant had ample opportunity to minimize the prejudicial effect of this testimony by bringing before the jury Edinborough's lack of certainty as to whether the comment he heard was in the form of a statement or a question, and Smith's inability to quote Gates verbatim. Viewing this evidence in the light most favorable to the Defendants, we are satisfied that the district court's determination that the probative value of the statements was not substantially outweighed by prejudice or confusion was not an abuse of discretion.

IV.

Finally, Appellant contends that the jury verdict on the federal claim and the trial court's determination on the state claim were against the great weight of the evidence.

[HN7]The jury's verdict on the federal civil rights claim is entitled to substantial deference. *Jewell v. CSX Transp. Inc.*, 135 F.3d 361, 366 (6th Cir. 1998)(citing *Davis v. Mutual Life Ins. Co.*, 6 F.3d 367, 374 (6th Cir. 1993), *cert. denied*, 510 U.S. 1193, 127 L. Ed. 2d 650, 114 S. Ct. 1298 (1994)). So are [HN8]the trial court's findings on the [*16] state wrongful death claim. A trial court's findings of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." FED. R. CIV. P. 52(a). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact it would have weighed the evidence differently." *Simon v. City of Youngstown*, 73 F.3d 68, 71 (6th Cir. 1998)(quoting *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 565, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985)).

Reviewing the jury verdict and the trial court's findings of fact in light of these standards, we conclude that there was sufficient evidence in the record to support the judgment in Defendants' favor.

Appellant contends the findings defy both the physical and the testimonial evidence. Specifically, Appellant contrasts the conflicting and erroneous statements of Officer Muhammad with the consistent testimony of witnesses McCoy, Onry and Evans, and notes that bullet [*17] wound evidence tends to show that Gates was not facing Defendant Muhammad when he was shot. Appellant also observes that Defendants themselves cannot agree on how the events occurred, but nevertheless both contend that the evidence supports the factual findings.

[HN9]In reviewing an appeal based on insufficiency of the evidence we may neither weigh the evidence, pass on the credibility of the witnesses, nor substitute our judgment for that of the jury or the trial court. Instead, we must view the evidence in the light most favorable to the appellees, drawing all reasonable inferences in their favor. *Jewell*, 135 F.3d at 366 (citing *Davis v. Mutual Life Ins. Co.*, 6 F.3d 367, 374 (6th Cir. 1993), *cert. denied*, 510 U.S. 1193, 127 L. Ed. 2d 650, 114 S. Ct. 1298 (1994)).

Viewing the evidence in this light, we cannot say that the trial court's findings of fact were clearly erroneous or that the jury's verdict was against the great weight of the evidence. Although there was evidence in the record that Muhammad gave conflicting statements and statements at odds with the other witnesses regarding the direction the Jeep was traveling in, whether [*18] the Jeep came to a full stop when he spoke to the occupants, and the extent of his conversation with the occupants of the Jeep, Muhammad's inability to clearly reconstruct the exact sequence of events could, as the trial court found, be attributable to the fact that he was traumatized by the incident. Moreover, despite the inconsistencies, the Appellants concede that the common and consistent theme in all of Muhammad's statements was that he shot Gates in self-defense when Gates aimed his weapon at him. A reasonable jury could have believed this critical portion of Muhammad's testimony even if they found some aspects of his recollection to be at odds with the rest of the evidence. There was substantial evidence from several witnesses that after Gates exited his car, he ran after the Jeep, and then turned and approached Muhammad with his gun in his hand. The evidence of record was sufficient to permit a reasonable person to find that Gates approached Muhammad rapidly and in an agitated manner, that he had a gun in his hand, that the gun was pointed in Muhammad's general direction, and that under the circumstances Muhammad perceived Gates as a threat sufficient to justify the use of [*19] deadly force.

The shooting death of Major Gates, a well-respected member of the Memphis Police Department, was by all accounts a most unfortunate tragedy. Upon review of the record as a whole, however, we are satisfied that there was substantial and competent evidence in the record to support the findings of the jury and the district court that Muhammad's use of deadly force was objectively reasonable.

V.

Accordingly, we **AFFIRM** the judgment of the district court.

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# EXHIBIT 9

THIRD JUDICIAL DISTRICT COURT - SALT LAKE

SALT LAKE COUNTY, STATE OF UTAH

| | |
|---|---|
| SUSIE STROHM/DORSEY & WHITNEY,<br>Plaintiffs,<br>vs.<br>CLEARONE COMMUNICATIONS, INC.,<br>Defendants. | Case No. 080917500 |

**BEFORE THE HONORABLE ROBERT K. HILDER**

THIRD DISTRICT COURT - SALT LAKE
450 SOUTH STATE STREET, FOURTH FLOOR
SALT LAKE CITY, UTAH 84114

**PENDING MOTIONS HEARING**
**JULY 1, 2009**

TRANSCRIBED BY: Matthew B. Rose, RPR, CSR

the ETA, is it thoroughly critical whether this letter, which may be a contract by way of indemnity, restates with clarity unequivocally the nature of the indemnity agreement?

MR. COUSIN: Yeah, I think it is important to evaluate each of these contracts or at least on the one hand the letter agreements, and on the other hand the ETA separately. Because the considerations of that was exchanged with respect to entering into the ETA, is really a whole other ballpark. It's a separation agreement between an executive and her employer, which carries with it, not uncommonly, indemnification obligations that continue.

But on the other hand, the letter agreements, the Bendeger and the Dorsey are completely different reads of the agreement in the sense that when Bendeger was first entered into, that was an existing, sitting executive where the company most likely, according to Mr. Marsden's papers -- and I don't have any reason to disagree with it.

At the time of the Bendeger agreement, the company is dealing with a sitting executive saying do we support you. And that document saying yes, we will pay your legal fees to defend you in connection with the SEC proceedings, we will do that. We will take that indemnity obligation.

And then later, when Mr. Marsden moves firms to Dorsey, that Bendeger agreement, the spirit of that

agreement is simply being updated.

THE COURT: Right.

MR. COUSIN: Exactly what Mr. Marsden says in the Dorsey letter, that it's being updated. He does not say in light of the ETA, as a result of the ETA. He doesn't say because of the ETA we don't need to update this.

He's saying exactly the opposite. He's saying there's a preexisting obligation that preexisted the ETA. We need to update that because I've switched law firms.

One other point about that is that Mr. Marsden is the attorney draftsperson. And so not only does the letter agreement have to be clear and unequivocal with respect to the scope of the requirement of what ClearOne has to pay, but piled onto that is the fact that Mr. Marsden, the attorney draftsperson himself, that agreement, any potential ambiguity must be construed against that attorney draftsperson.

And just for the sake of argument, even if it were not an indemnity agreement or by way of an indemnity agreement, that principle still remains. The principal of attorney draftsperson and ambiguity being interpreted against the attorney draftsperson, that principle of contract construction still remains even if it's somehow not by way of an indemnity.

So that, you know, the best Mr. Marsden can do in

case. So I have been working from the documents.

The ETA is the only integrated document here as far as I'm aware. So that one I have to look at the document and only the document to determine ambiguity, which I have determined possibly as to scope. But as I agree with you, we may or may not get to that depending on other interpretations.

The letter agreements I have found them to be ambiguous. And then my first duty is to find evidence if it's available to give me the intent of the parties. And I don't think that means I just construe it against because then every ambiguous contract would be construed against in the way least favorable to the drafting party, and that's not our first duty to determine what the parties, in fact, agreed.

So that's the way I see it. Unless you've got anything more on this we should hear from Mr. Marsden, but if you do -- but you will get the last word. Anything more on this issue, though?

MR. COUSIN: I'm fine, your Honor, thank you.

THE COURT: Thank you, Mr. Cousin. Mr. Marsden if you use the microphone you'll probably be heard, otherwise you need to come up closer.

MR. MARSDEN: I'll use the microphone --

THE COURT: If you talk right into it I don't think

# ADDENDUM D

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**IN THE THIRD JUDICIAL DISTRICT COURT**

**SALT LAKE COUNTY, STATE OF UTAH**

| | |
|---|---|
| **SUSIE STROHM and DORSEY & WHITNEY, LLP,**<br><br>**Plaintiffs,**<br><br>**v.**<br><br>**CLEARONE COMMUNICATIONS, INC.,**<br><br>**Defendant.** | **DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT**<br><br>**Civil No. 080917500**<br><br>**Honorable Robert K. Hilder** |

Defendant ClearOne Communications, Inc. ("Defendant" or "ClearOne"), by and through counsel of record MAGLEBY & GREENWOOD, P.C. and SEYFARTH SHAW LLP, hereby submits this reply memorandum of law in support of its cross-motion for summary judgment.

## PRELIMINARY STATEMENT

Extrinsic evidence of the Dorsey engagement letter does not resolve its ambiguity and necessitates construing it against its attorney-draftsman. The Court should disregard Mr. Keough's testimony about his current understandings or speculation about what he "would have understood"

about the legal terms of the engagement letters as that testimony is outside the scope of Mr. Keough's 30(b)(6) designation and was elicited by objectionable leading questions likely to supply a false memory from a disgruntled witness. Any contention that Mr. Keough actually remembers what he understood about legal documents more than 5½ or 6½ years ago is unbelievable as a matter of law. The extrinsic evidence establishes that ClearOne did not know Mr. Marsden's criminal trial experience or reputation, did not believe that a full-blown criminal trial was within the realm of possibility, and therefore did not consider that the Dorsey engagement letter would cover a federal criminal proceeding. Since Mr. Marsden could have, but failed to, clearly express an intent to cover a federal criminal proceeding, the Dorsey engagement letter should be construed against its drafter.

The highly prejudicial and controversial attorneys' fees and 18% interest rate terms from the Bendinger engagement letter were not incorporated by reference into the Dorsey engagement letter. The mere reference to the Bendinger engagement letter did not reasonably apprise ClearOne that two controversial terms therefrom – but no other terms – were intended to be incorporated as part of the Dorsey engagement letter. In any event, as a matter of public policy, Utah law prohibits a law firm from recovering attorneys' fees when it uses its own attorneys in a collection action.

Ms. Strohm's ETA claim should be dismissed as moot because it does not impose any obligation to indemnify Strohm for defense expenses beyond the Court's mandatory indemnification order. The current proceeding is not a "Related Proceeding" under the ETA because it does not involve allegations of ClearOne's improper revenue recognition. Moreover, the standards for determining fee reasonableness are the same under the mandatory indemnification statute and the ETA.

Moreover, Ms. Strohm does not have a viable claim for permissive indemnification because ClearOne's Board has not authorized any indemnification as would be required. Plaintiffs' unjust

enrichment claim also fails because an enforceable contract governs the same subject matter and ClearOne did not benefit from Dorsey's services for Ms. Strohm. Finally, since Plaintiffs have failed to cite any single promise not contained in the ETA, Ms. Strohm's promissory estoppel claims should be dismissed.

## ARGUMENT

## POINT I

### THE DORSEY ENGAGEMENT LETTER DOES NOT COVER MS. STROHM'S THEN NON-EXISTENT AND UNANTICIPATED FEDERAL CRIMINAL PROCEEDING

#### A. The Court Should Disregard Mr. Keough's Testimonial Responses to Objectionable Leading Questions Allegedly Designed to Have Him Recall What He Understood Years Ago About Legal Documents Where the Risk of Supplying a False Memory for a Disgruntled Witness Is So Great

Plaintiffs ask the Court to believe the unbelievable – namely, that ClearOne's former CEO Michael Keough actually remembered on October 7, 2009 (when his deposition was taken) what he originally understood the Bendinger and Dorsey engagement letters to mean on January 29, 2003 and March 31, 2004 (when he originally signed them). It defies logic to believe that any witness – much less a lay witness testifying about a legal interpretation without reference to notes or any recollection of discussions with anyone – can realistically recall what he actually understood more than 5½ or 6½ years ago about the terms of an agreement, or whether he actually ever had any understanding about such terms at all.

In addition to this significant time gap, the dangers of accepting as true responses to leading questions from a "friendly" witness are well known:

> The "essential test of a leading question is whether it so suggests to the witness the specific tenor of the reply desired by counsel that such a reply is likely to be given irrespective of an actual memory. ***The evil to be avoided is that of supplying a false memory for the witness***." [*United States v. Durham*, 319 F.2d 590, 592 (4th Cir. 1963).] The restrictions against leading questions are "designed to guard against the risk of improper suggestion inherent in examining

> friendly witnesses through the use of leading questions." [*Ellis v. Chicago*, 667 F.2d 606, 612 (7th Cir. 1981).]

4 *Weinstein's Federal Evidence* § 611.06[2][a], at 611-59 (2d ed. 2009) (emphasis added) ("What Constitutes Leading Question / Tenor of Desired Reply"). Indeed, the dangers of leading questions are so great that the court always retains the discretion to limit their use:

> Leading questions must not be allowed in controverted substantive areas in which the jury must weigh the evidence and make credibility determinations.[1] "***[A]ny good trial advocate who is allowed leading questions can both testify for the witness and argue the client's case by the use of leading questions. This practice must not be allowed.***" [*Stine v. Marathon Oil Co.*, 976 F.2d 254, 266 (5th Cir. 1992).] * * * *
>
> When the witness is biased in favor of the cross-examiner, the same danger of leading questions arises as on direct, and the court may, in its discretion, prohibit their use. [*U.S. v. Hall*, 165 F.3d 1095, 1117 (7th Cir. 1999).]

4 *Weinstein's Federal Evidence* § 611.06[4], at 611-64 (2d ed. 2009) (emphasis added) ("Right to Ask Leading Questions Not Absolute").

Plaintiffs falsely contend that "the use of leading questions is absolutely appropriate with an adverse party" pursuant to Utah Rule of Evidence 611(c) and erroneously accuse ClearOne of citing only one unreported Sixth Circuit case for the proposition that the court has the discretion to preclude the use of leading questions to avoid abuses of the rule (Pls' Reply Br. 7 & n.9). However, Utah Rule of Evidence 611(c) is identical to its federal counterpart and both treat an "adverse party" and a "witness identified with an adverse party" the same. Indeed, ClearOne's opening brief quoted the Utah Supreme Court for the proposition that "Rule 611(c) is still framed in words of suggestion

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[1] While the proper interpretation of the Dorsey engagement letter is a legal question for the Court, Plaintiffs' leading questions were asked in the context of a hotly controverted substantive area requiring the weighing of evidence and possible credibility determinations.

rather than command, and whether it will be applied is a matter ultimately left to the discretion of the trial judge." *State v. Johnson*, 784 P.2d 1135, 1143 (Utah Sup. Ct. 1989).[2]

ClearOne urges that the Court exercise its discretion to disallow the use of leading questions on such consequential and controverted topics regarding the specifics of Mr. Keough's 5½ and 6½ year old understandings about the legal terms of the letter agreements when the risk of supplying a false memory for the witness is so great. Plaintiffs dismiss any claim of animus or bias by Mr. Keough against ClearOne simply because Mr. Keough did not confess at his deposition to having any bias against ClearOne (Pls' Reply Br. 7). Although Mr. Keough was not asked at his deposition whether he had any animus or bias against ClearOne, he did, however, testify about the circumstances of his departure from ClearOne:

> Q. … And how long did you remain as the CEO of ClearOne?
>
> A. Until about June of 2004.
>
> Q. And why did you – did you leave ClearOne?
>
> A. I was relieved by Dal Bagley, the chairman.
>
> Q. And when you say "relieved," was this something where you did not voluntarily step down?
>
> A. Oh, no, I did not voluntarily step down.
>
> Q. What was your understanding as to why you were relieved as the CEO by Dal Bagley?
>
> A. Well, you know, I was never specifically told, but I did know it revolved around my administrative assistant having returned after being on medical leave for six months.
>
> Q. And what –
>
> A. Well, it was quite shocking to me, quite frankly, because I had never had an issue with my admin. And she, six months prior – since you asked, she called in one day at HR and said she had a death in the family and was going to San Diego and wouldn't be in. The following day she called in and said she was going into rehab. And on the last day of her six month leave that's apparently allowed, she

[2] Plaintiffs' claim of waiver pursuant to Rule 32(c)(3)(B) is specious given ClearOne's ubiquitous objections to the form of Mr. Hancock's questions and expressed "leading" objections (Keough Dep. 118:8). ClearOne's "seasonable objection," however, did not deter Mr. Hancock from continuing to pose improperly leading questions on the key issues in dispute.

> surfaced and made some allegations. I was never actually told what they were. Never knew what it was about. But Dal decided that, okay, that was going to be that.

Keough Dep. 27:11-28:12. It does not take a rocket scientist to conclude – based on the foregoing testimony – that Mr. Keough still feels that he was wrongfully ousted from his CEO position at ClearOne. While business protocol may require that he address questions about letters he signed years earlier on behalf of the company, it does not require that he necessarily disagree with the legal position of a current claimant against the company that he views as having wrongfully ousted him. Based upon all of the foregoing, ClearOne submits that it has presented both evidence of Mr. Keough's animus and a proper basis for precluding the use of leading questions on controverted substantive issues.

**B. Mr. Keough Repeatedly Testified About His Current Interpretation of the Engagement Letters and Speculated About What He "Would Have" Understood When He Signed Them**

Significantly, Mr. Keough was not designated to testify about his current "interpretation" of the engagement letters, but rather about the circumstances surrounding the engagement letters' negotiation and execution and communications about such letters. While Plaintiffs attempt to deny that Mr. Keough testified about his current interpretation (Pls' Reply Br. 6, n.7), the deposition transcript reveals that Mr. Keough responded to a confusing mix of leading and hypothetical questions that he reasonably could have construed as designed to determine his current understanding of the legal terms of engagement letters in view of all that has occurred in the interim:

> Q. Did ClearOne agree [in the Bendinger engagement letter] to pay invoices from Mr. Marsden for the services he rendered in representing Ms. Strohm as they were billed within 30 days after receipt?
>
> A. Did they actually do that or is –
>
> Q. Is that what they agreed to?
>
> A. Yes.

Q. And did ClearOne also agree that any amount unpaid after the 30 days would bear and accrue interest at a rate of 18 percent?

A. If that was in the original draft as it is here, yes.

Q. Okay. And is that your understanding of paragraph 3, the second paragraph where it says, "Any amount billed and unpaid after such thirty day period shall bear and accrue interest at the rate of 18 percent per annum from the date billed until paid?"

A. Yes.

Mr. Capobianco: Objection to form. Are you asking what he thinks it means now?

Mr. Hancock: I'm asking him with respect to when he signed this letter as ClearOne's CEO. Okay?

Q. (By Mr. Hancock) Is that your understanding?

A. Yes.

Q. Thank you. And in the first paragraph – before we get there, if I remember correctly, and I just want to confirm, you stated earlier that it was your understanding, at the time that Mr. Marsden was retained and then you signed Exhibit 9 [Bendinger engagement letter] on behalf of ClearOne, that the scope of his retention would be the SEC action?

A. Yes.

Q. It would include the DOJ action?

Mr. Capobianco: Objection to form.

Q. Is that correct?

A. Yes.

Q. And if I understand you, and you tell me if I'm wrong, it would include any criminal indictments; defending against those with respect to Ms. Strohm?

Mr. Capobianco: Objection to form.

A. Yes. Nothing was excluded, as I remember.

Q. Okay. I'm just trying to understand what your understanding was of what it included, okay?

A. Okay.

Q. And you understood at that time that, based on the DOJ action, there was the possibility of criminal indictments and a criminal action against Ms. Strohm; is that correct?

A. Yes.

Mr. Capobianco: Objection to form.

Q. And at the time you signed this agreement, you understood that Mr. Marsden's retention, as set forth in Exhibit 9, included representing Ms. Strohm in those actions.

Mr. Capobianco: Objection to form.

Q. Meaning the SEC action, the DOJ investigation, criminal indictments, and any criminal action against Ms. Strohm. Is that correct or not?

Mr. Capobianco: Objection to form.

A. Yes.

Q. And the first paragraph states, "This letter will summarize and confirm the agreement for my firm, Bendinger, Crockett, Peterson & Casey, to represent Susie Strohm's interests in connection with the SEC civil Complaint, referenced above, and in connection with further related investigation in the litigation." [sic]

A. Yes.

Q. And did you read that paragraph prior to signing Exhibit 9?

A. Yes.

Q. And what was your understanding as to what the term "further related investigations and litigation" meant?

A. It was early on and I don't think anybody knew what would spawn from that. But effectively that as the CFO of the company, she was going to be indemnified.

Q. Prior to signing this on January 29, 2003, you understood that there was a DOJ investigation, right?

A. That was part of what was going on, yes.

Q. Okay. And so you understood Mr. Marsden's representation when it talks about the SEC action referenced above, "and in connection with further related investigations and litigation," that "investigation," you understood to be the DOJ investigation?

Mr. Capobianco: Objection to form.

A. Yes.

Q. And did you understand where it says "further related investigations and litigation," with your understanding that there was a DOJ investigation going on, that the term, "in connection with further related investigation and litigation," would include, if it happened, a criminal indictment and criminal action against Ms. Strohm?

Mr. Capobianco: Objection to form.

A. ***That would have been my understanding, yes***.

Keough Dep. 110:9-114:11 (emphasis added). Indeed, on key issues, Mr. Keough repeatedly used the conditional perfect – e.g., "would have been" – to indicate that he did not actually recall what his understanding was at the time he signed the engagement letters. *See* Keough Dep. 117:21 ("That would have been my expectation."); *id.* at 119:9-10 ("My assumption would be – do I remember that? No."); *id.* at 127:21 ("That would have been my expectation, yes."); *id.* at 128:22 ("I would have had no expectation that would change, no."); *id.* at 140:16-18 ("I would have found out probably at a board meeting at the same time as everybody else that was on the board.").

Moreover, on other significant issues, Mr. Keough expressly testified about his current understanding regarding the engagement letters. *See id.* at 116:1-2 ("My understanding [regarding attorney's fees] ***is*** that it was as written here.") (emphasis added); *id.* at 129:18-20 ("So the only understanding that you ***have*** with respect to the enforcement of attorneys' fees ...") (emphasis added); *id.* at 130:23-25 ("Does Exhibit 10 [Dorsey engagement letter], as you ***understand*** it, amend that provision; update it to get rid of interest fees?") (emphasis added).

### C. Mr. Keough's Testimony is Not Binding Upon ClearOne Because It Was Outside the Scope of His Rule 30(b)(6) Designation

Testimony outside the scope of Mr. Keough's Rule 30(b)(6) designation is not binding upon ClearOne. *See Falchenberg v. New York State Dep't of Educ.*, 567 F.Supp.2d 513, 521 (S.D.N.Y. 2008) ("Questions and answers exceeding the scope of the 30(b)(6) notice will not bind the corporation"). Plaintiffs contend that Mr. Keough's testimony is within the scope of his designation because the parties' understanding of the terms of the engagement letters constitutes a "circumstance surrounding" the negotiation, execution, or communication regarding the engagement letters (Pls' Reply Br. 5). While Mr. Keough's actual understanding of the engagement letters at the time he signed them might constitute a circumstance within the scope of the 30(b)(6) designation, Mr. Keough repeatedly testified about his current understanding or his speculation about what he would have understood, as shown above. Mr. Keough's current understanding or

speculation about the engagement letters' legal terms simply cannot constitute a "circumstance surrounding" the negotiation, execution, or communication of those letters. Thus, Mr. Keough's testimony on this issue was outside the scope of his 30(b)(6) designation and is not binding upon ClearOne.[3]

**D. Mr. Keough's Testimony About What He "Would Have" Understood Years Ago is Unbelievable and Controverted By His Own Testimony**

Even if Mr. Keough's testimony was within the scope of Mr. Keough's 30(b)(6) designation, it may be controverted, impeached, or explained by ClearOne. *See Indus. Hard Chrome, Ltd. v. Hetran, Inc.*, 92 F.Supp.2d 786, 791 (N.D. Ill. 2000) ("testimony given at a Rule 30(b)(6) deposition is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes"); *DeGrado v. Jefferson Pilot Financial Ins. Co.*, No. 02-cv-01533, 2009 WL 279019, at *21 (D. Colo. Feb. 5, 2009) ("As noted by several courts, the binding effect of the testimony of a Rule 30(b)(6) representative is merely as an evidentiary admission, which may be controverted or explained by a party.").

Here, Mr. Keough controverts and impeaches his own testimony. On the one hand, Mr. Keough testified that his signing of the engagement letters was a mere rubber-stamping of a decision by ClearOne's Board – which, he concedes, never discussed the issue of the scope of Mr. Marsden's retention (ClearOne Facts ¶¶ 10, 15). Indeed, Mr. Keough testified that he was authorized to sign the engagement letters because somebody – possibly a Board member – told him that Mr. Marsden would be representing Ms. Strohm (ClearOne Facts ¶ 12). This testimony regarding Mr. Keough's authority and the basis for it directly contradicts his sycophantic agreement

[3] To the extent Mr. Keough purported to testify about his actual recollection about what he understood 5½ or 6½ years ago about the legal terms of the engagement letter, such testimony is unbelievable as a matter of law. Additionally, it is contradicted by Mr. Keough's testimony that his authority to sign the engagement letters derived solely from the Board and that the only conversation he can recall with any Board member involved only the statement that Steve Marsden would be representing Ms. Strohm without any mention of the scope of representation (ClearOne Facts ¶¶ 10, 12-13).

with Mr. Hancock's statements about what Dorsey desires the engagement letters to mean. Also, as argued above, it is simply unbelievable that anybody's memory about what he understood about a letter read 5½ or 6½ years ago could possibly be that good. In sum, even if Mr. Keough's testimony about what he understood the engagement letters to mean when he signed them was within the scope of his 30(b)(6) designation, such testimony has been contradicted by his own testimony and impeached by common sense.

**E. Since Discovery Has Not Definitively Resolved the Intent of Both Parties, The Dorsey Engagement Letter Must be Strictly Construed Against Dorsey**

Plaintiffs erroneously contend (Pls' Reply Br. 3) that this Court has already rejected Utah's "general principle that a court will strictly construe terms in a contract against one who is both the attorney draftsman of and a party to the instrument." *Phillips v. Smith*, 768 P.2d 449, 451 (Utah Sup. Ct. 1989). While the Court has ordered discovery into extrinsic evidence, it has not explicitly or implicitly rejected the *contra proferentem* rule. In view of the extrinsic evidence establishing that a criminal proceeding against Ms. Strohm was then non-existent and unanticipated and the fact that Steve Marsden's criminal trial experience and reputation were unknown to ClearOne, ClearOne could not have reasonably intended for the Dorsey engagement letter to cover any hypothetical and entirely unanticipated criminal proceeding against Ms. Strohm.

The official rationale for the *contra proferentem* rule amply demonstrates the appropriateness of its applicability in this case:

> Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning. ***Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert.*** In cases of doubt, therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party.

*Restatement (Second) of Contracts*, § 206, comment a (1981) (emphasis added). Here, if Steve Marsden intended for the Dorsey engagement letter to cover a full-blown federal criminal proceeding, it was incumbent upon him to make that intention clear before asking ClearOne to commit to it. Mr. Marsden's decision to deliberately obscure what he could have made clear warrants construing the engagement letter against Dorsey.

In fact, given that the SEC Action and other related civil proceedings were then in the process of winding down when Mr. Marsden decided to switch firms, ClearOne only intended for the Dorsey engagement letter to cover the transfer to Dorsey of the legal work that still needed to get done on the then-pending civil litigations. When the Dorsey engagement letter was signed, Steve Marsden himself did not consider the U.S. Department of Justice ("DOJ") investigation to be a "file[] on which [he] was currently representing" Ms. Strohm (ClearOne Facts ¶ 29)[4] and ClearOne believed that the DOJ investigation "had died" (ClearOne Facts ¶ 35).

Thus, even if the engagement letters are construed to cover the DOJ investigation (for which Bendinger performed minimal if any work (ClearOne Facts ¶¶ 24, 26-27)), there is no evidence that either party reasonably expected a full-blown federal criminal proceeding against Ms. Strohm by the time the Dorsey engagement letter was signed. Therefore, at a minimum, the extrinsic evidence of the surrounding facts and circumstances is ambiguous and requires – by virtue of the *contra proferentem* rule – the conclusion that the Dorsey engagement letter does not cover the federal criminal proceeding against Ms. Strohm. *See Jones, Waldo, Holbrook & McDonough v. Dawson*, 923 P.2d 1366, 1372 (Utah Sup. Ct. 1996) ("The rule that doubts are to be resolved against the attorney comports with the general rule of contract interpretation that ambiguous language is to be

[4] Although Plaintiffs cite Mr. Marsden's attempt to deny that he did not consider the DOJ investigation to be pending when he filled out the Dorsey Conflicts and Screening Report (Pls' Reply Br. 14), Plaintiffs cannot deny that Mr. Marsden identified Ms. Strohm as a "major client" and the "Securities and Exchange Commission" as an adverse party, but failed to identify the U.S. Department of Justice as an "adverse part[y]" (ClearOne Facts ¶¶ 29-31; ClearOne Moving Br. Ex. G at p. 2).

construed against the drafter."); *Penn Star Mining Co. v. Lyman*, 64 Utah 343, 352, 231 P.107, 110 (Utah Sup. Ct. 1924) ("when the evidence … shows that a lawyer, who is an interested party, prepared the contract for the defendants, who are laymen, the [*contra proferentem*] rule has special application").

**F. The Extrinsic Evidence Establishes that ClearOne Did Not Know Mr. Marsden's Criminal Trial Experience or Reputation, Did Not Believe That a Full-Blown Criminal Trial Was Within the Realm of Possibility, and Therefore Did Not Consider that the Dorsey Engagement Letter Would Cover a Federal Criminal Proceeding**

While Plaintiffs try to dismiss ClearOne's presentation of extrinsic evidence as "a series of marginally relevant misrepresentations" (Pls' Reply Br. 2), the facts presented by ClearOne constitute highly relevant facts and circumstances surrounding the "negotiation" and execution of the engagement letters at issue – as opposed to speculation by ClearOne's disgruntled former CEO about what he "would have thought" more than 5½ or 6½ years earlier. Plaintiffs do not dispute that there was no negotiation of the engagement letters drafted by Steve Marsden (ClearOne Facts ¶¶ 8, 19, 20) or that Mr. Keough recalls no discussion about the letters (ClearOne Facts ¶¶ 9, 21). Nor can they meaningfully contest the facts and circumstances surrounding the letters' execution.

First, Plaintiffs admit that Steve Marsden did not hold himself out as a white collar criminal lawyer (ClearOne's Statement of Facts ¶ 3). Nonetheless, they attempt to quibble about his alleged "handl[ing of] criminal matters" (Plaintiffs' Response to ¶ 1). The testimony cited, however, does not establish that Steve Marsden was a white collar criminal defense trial lawyer or, more importantly, that anyone at ClearOne had any knowledge of his alleged expertise such that they might have considered his handling Ms. Strohm's criminal defense, which was then non-existent and unanticipated. Mr. Marsden testified as follows:

> Q. At the time you switched from Bendinger to Dorsey, how many white-collar criminal defense trials had you handled?
>
> A. None.

Marsden Dep. 150:18-21.

Incredibly, Plaintiffs contend that Mr. Marsden's lack of criminal trial experience or reputation is irrelevant to whether the parties intended the engagement letters to cover the criminal proceeding (Plaintiffs' Response to ¶ 1). It is hard to conceive how ClearOne could have possibly intended the engagement letters to cover the criminal proceeding if it did not anticipate any such proceeding and knew nothing about Mr. Marsden's expertise or reputation in this area.

Even Mr. Keough conceded that he did not and still does not know anything about Mr. Marsden's criminal defense experience (ClearOne Facts ¶ 5). Plaintiffs ask the Court to draw the inference that since Mr. Keough testified that he understood the engagement letters to cover the criminal proceeding, Mr. Marsden's criminal experience must have been irrelevant (Pls' Reply Br. 13-14). The most credible inference, however, is that since Mr. Keough had no knowledge of Mr. Marsden's criminal experience, he did not seriously consider whether the Dorsey engagement letter – transferring the work to Mr. Marsden at his new firm – would cover a criminal proceeding when he signed it. Indeed, this is the only reasonable inference that can be drawn given Mr. Keough's admission that he did not remember discussing the Bendinger engagement letter with anyone:

> [B]ecause in a lot of ways when I was signing here, it was what had already been decided by the board. So I'm not going to call it a formality, but there was nothing I was going to either really change or have a lot of input on. It was going to be decided by the board.

(ClearOne Facts ¶ 10). Mr. Keough also recalls no discussions with anyone about the Dorsey engagement letter (ClearOne Facts ¶ 21). While Mr. Keough thus conceded that his authority was derived solely from ClearOne's Board, the only thing that he had been told by a Board member (or by someone from the Clyde, Snow law firm) about Steve Marsden was that Mr. Marsden would be representing Ms. Strohm (ClearOne Facts ¶ 12), which – given Mr. Marsden's lack of criminal trial experience – says absolutely nothing about the scope of Mr. Marsden's representation including

criminal defense.[5] In sum, ClearOne's lack of knowledge about Mr. Marsden's white collar criminal trial experience or reputation demonstrates that ClearOne did not reasonably understand either engagement letter to cover a full-blown federal criminal proceeding.

Plaintiffs attempt to dismiss the relevance of ClearOne's belief that a criminal proceeding was not a reasonable probability in the Fall of 2003 (ClearOne Facts ¶¶ 33-35) on the grounds that such belief occurred after the Bendinger engagement letter was signed (Pls' Reply Br. 10). However, ClearOne's belief in the Fall of 2003 is highly relevant to its understanding of the Dorsey engagement letter, which was not signed until March 31, 2004 – after ClearOne formed this belief and had made a decision based upon that belief to sue ClearOne's Directors and Officers liability carriers (ClearOne Facts ¶ 34).[6]

Plaintiffs argue that ClearOne must have believed that the Dorsey engagement letter covered the federal criminal proceeding because ClearOne – a public company with fiduciary obligations to its shareholders – paid invoices in excess of $1.8 million for Ms. Strohm's criminal defense (Pls' Reply Br. 13). However, Plaintiffs offer no evidence that ClearOne paid said invoices ***pursuant to the Dorsey engagement letter***. To the contrary, in the May 2007 E-mail exchange between Mr. Marsden and Ray Etcheverry, Mr. Marsden asked ClearOne to acknowledge that the grand jury proceeding was covered by Ms. Strohm's Employment Termination Agreement and the Dorsey engagement letter was not raised or discussed in this E-mail exchange (Pls' Br. Ex. 4). When the issue of the Dorsey engagement letter was first raised in William Michael's letter to Greg A. LeClaire dated November 8, 2007 (ClearOne Moving Br. Ex. D at p. 3), ClearOne responded that

[5] While Plaintiffs repeatedly claim that the Board did not discuss limiting the scope of Mr. Marsden's representation, Mr. Keough testified that he did not recall any discussions at all about said scope (ClearOne Facts ¶ 15).

[6] Mr. Keough's testimony that it was allegedly his expectation that a criminal action would be brought against Ms. Strohm is contradicted by Jeff Gross's testimony (ClearOne Facts ¶¶ 33-35) and by Mr. Keough's own testimony that the proceedings related to the SEC Action "had pretty much been worked through on most fronts during 2003" (Keough Dep. 163:6-14) and "had pretty well been put to bed" (Keough Dep. 164:4).

"the retainer agreements governed the SEC complaint and not the current U.S. Department of Justice action" (ClearOne Moving Br. Ex. E at p. 3).

Accordingly, ClearOne respectfully requests that the Court grant ClearOne's motion for summary judgment with respect to Plaintiff Dorsey's engagement letter claim (Third Claim for Relief in the Amended Complaint).

## POINT II

## CLEARONE IS NOT LEGALLY OBLIGATED TO PAY DORSEY'S ATTORNEYS' FEES OR 18% INTEREST PURSUANT TO THE DORSEY ENGAGEMENT LETTER

### A. The Dorsey Engagement Letter Does Not Incorporate By Reference the Attorneys' Fees or 18% Interest Rate Terms from the Bendinger Engagement Letter

Plaintiffs continue to press their claim that the Dorsey engagement letter incorporates by reference just the attorneys' fees and 18% interest rate terms – but not any other terms – from the Bendinger engagement letter (Pls' Reply Br. 15-18). ClearOne previously showed that the 2 engagement letters are stand-alone agreements – one setting forth the Bendinger terms and the other setting forth the Dorsey terms – without any incorporation by reference. Indeed, ClearOne demonstrated that no client would be reasonably apprised that just those 2 highly prejudicial and controversial terms would be incorporated by reference by Mr. Marsden's use of the term "update." Any attempt to incorporate terms from another document must clearly communicate both the express terms and the intent to incorporate them into the document at issue:

> To incorporate material by reference, the host document must identify with detailed particularity what specific material it incorporates and clearly indicate where that material is found in the various documents identified. In other words, the incorporating contract must use language that is *express* and *clear*, so as to leave no ambiguity about the identity of the document being referenced, ***nor any reasonable doubt about the fact that the referenced document is being incorporated into the contract.***

> * * * * [T]he language used in a contract to incorporate extrinsic material by reference must explicitly, or at least precisely, identify the written material being incorporated and ***must clearly communicate that the purpose of the reference is to incorporate the referenced material into the contract*** (rather than merely to acknowledge that the referenced material is relevant to the contract, e.g., as background law or negotiating history).

*Northrop Grumman Information Technology, Inc. v. United States*, 535 F.3d 1339,1344-45 (Fed. Cir. 2008) (emphasis added; quotation marks and citations omitted). While the Dorsey engagement letter references the Bendinger engagement letter, it does not clearly or expressly communicate that the purpose of the reference is to incorporate terms from the Bendinger engagement letter into the Dorsey engagement letter. Nor are the express terms that Dorsey claims are incorporated specified in any way.

Plaintiffs argue that their legal interpretation should prevail primarily because Mr. Keough agreed with it at deposition. For all the reasons set forth in Point I, Mr. Keough's testimony on his current legal interpretation of the Dorsey engagement letter should be rejected as non-binding on ClearOne and wholly unbelievable in any event. To state the obvious: it defies common sense to believe that Mr. Keough remembered the attorneys' fees and 18% interest rate terms from the January 29, 2003 Bendinger engagement letter on March 31, 2004 (when he signed the Dorsey letter) and that he intended for just those 2 terms to be carried over into the Dorsey engagement letter.

Contrary to Plaintiffs' contention (Pls' Reply Br. 15), ClearOne's counsel never contended that the engagement letters "are intended to be treated as one agreement." At the cited pages of the July 1, 2009 hearing transcript, ClearOne argued the Dorsey engagement letter was an "update" of the Bendinger engagement letter – not of Ms. Strohm's ETA. ClearOne never represented that the two engagement letters were intended to be treated as one agreement.

**B. Utah Law Prohibits a Law Firm from Recovering Attorneys' Fees When It Uses Its Own Attorneys in a Collection Action**

In any event, under Utah law, a law firm is not entitled to attorneys' fees in a *pro se* collection action even if the agreement includes an attorneys' fees provision. *Jones, Waldo, Holbrook & McDonough v. Dawson*, 923 P.2d 1366, 1374 (Utah Sup. Ct. 1996). In *Jones, Waldo*, the Utah Supreme Court was faced with a retainer agreement which stated that "the undersigned ... agrees to pay all collection costs, including attorney's fees incurred in the enforcement of this agreement." *Jones, Waldo*, 923 P.2d at 1374. In holding that the law firm could not recover its own attorneys' fees in connection with its collection action, the Utah Supreme Court reasoned:

> In *Smith v. Batchelor*, 832 P.2d 467, 473 (Utah 1992), we recognized the "general rule that pro se litigants should not recover attorney fees for successful litigation." Although, as we acknowledged in *Batchelor*, the jurisdictions are divided in their treatment of the issue, we here reaffirm our view that the ability to competently present the claim without retained counsel is a sufficient advantage for a lawyer-litigant. We remain "loath to enhance that advantage by giving the lawyer-litigant recovery not only as a successful party, but also as that party's attorney." *Id.* at 474.
>
> There are other compelling public policy reasons for holding that "pro se litigants should not recover attorney fees, regardless of their professional status." *Id.* "Financing litigation by fee awards provides a new incentive to lawyers to increase their fees. The adversary's response is to litigate the fee claim itself." Dan B. Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 Duke L.J. 435, 438 [hereinafter Dobbs]. This gives rise to the danger of "creating a 'cottage industry' for claimants ... as a way to generate fees rather than to vindicate personal claims." *Falcone v. Internal Revenue Serv.*, 714 F.2d 646, 648 (6th Cir. 1983)(declining to award attorney fees for pro se representation to prevailing plaintiffs under Freedom of Information Act). As the court in *White v. Arlen Realty & Development Corp.*, 614 F.2d 387, 388 (4th Cir. 1980), observed: "It is axiomatic that effective legal representation is dependent not only on legal expertise, but also on detached and objective perspective. The lawyer who represents himself necessarily falls short of the latter."
>
> In addition, "in the case of a paying client, the lawyer who wants to retain client satisfaction will have an incentive to limit the total fee. That incentive is not present in fee award cases." Dobbs, *supra*, at

> 485. Although the case at hand provides a working illustration of all of the above problems, this last concern is probably the most serious. By way of example, [Attorney] Shaw sought to charge [Client] Dawson $900 for his time preparing for and appearing at trial as a witness. A captive client, such as Dawson became in this collection action, has no control over the amount of time the attorney will spend or how it will be spent. And plaintiff has no motivation to explore less expensive collection alternatives.
>
> Plaintiff points out that *Batchelor* treated an award of attorney fees under a statute rather than a written retainer agreement as in the instant case. We conclude that plaintiff is not aided by that difference. The retainer agreement states that the client is responsible for "attorneys' fees incurred in the enforcement of this agreement." It is by no means self-evident that the time a lawyer spends on his own case represents fees "incurred." In *Swanson & Setzke, CHTD v. Henning*, 116 Idaho 199, 774 P.2d 909, 910 (Idaho Ct. App. 1989), the Idaho court interpreted "attorney fee" as denoting "a monetary obligation (a fee) paid or owed from one person (a client) to another person who has provided legal representation (an attorney)." We agree that under such an interpretation, "an attorney's fee 'presupposes a relationship of attorney and client' which does not exist in pro se situations." *Id.* (citing *Davis v. Parratt*, 608 F.2d 717, 718 (8th Cir. 1979). It is our view that a law firm does not "incur" fees when it uses its own attorneys in a collection action. Therefore, we hold that the trial court was correct in ruling that plaintiff was not entitled to attorney fees in its pro se collection action against Dawson.

*Jones, Waldo, Holbrook & McDonough v. Dawson*, 923 P.2d 1366, 1374-75 (Utah Sup. Ct. 1996).

Therefore, pursuant to the *Jones, Waldo* rule, Dorsey is not entitled to collect attorneys' fees in connection with its pro se collection action against ClearOne. With respect to its Dorsey engagement letter claim, Dorsey is representing itself – not Ms. Strohm – and is therefore pro se. Since Dorsey is using only its own attorneys in the instant collection action against ClearOne, and is seeking to collect pursuant to an engagement letter which it claims has an attorneys' fees provision, Dorsey is not entitled to attorneys' fees pursuant to the Dorsey engagement letter for public policy reasons. Moreover, the Bendinger engagement letter contains the following language on "Attorney Fees":

> In the event of termination of this Agreement, we shall be entitled to receive billed or unbilled fees, costs, and expenses incurred in this

> matter. In addition, we shall be entitled to recover all reasonable costs expended in connection with collecting amounts due under this Agreement, including reasonable attorneys' fees.

ClearOne Moving Br. Ex. A at ¶ 7. Just as the *Jones, Waldo* court ruled that a law firm does not "incur" fees when it uses its own attorneys in a collection action, Dorsey has not "expended" attorneys' fees since it has used its own attorneys in this action. Therefore, ClearOne is entitled to summary judgment with respect to the Dorsey engagement letter's attorneys' fees claim.

In sum, the Court should reject Plaintiffs' attempt to hold ClearOne responsible for Dorsey's attorneys' fees in this action or an 18% interest rate.

## POINT III

## STROHM'S EMPLOYMENT TERMINATION AGREEMENT CLAIM SHOULD BE DISMISSED AS MOOT BECAUSE IT DOES NOT IMPOSE ANY OBLIGATION TO INDEMNIFY STROHM FOR DEFENSE EXPENSES BEYOND THE COURT'S MANDATORY INDEMNIFICATION RULING

Plaintiffs contend that Ms. Strohm's Employment Termination Agreement ("ETA") (Second and Eighth Claims) entitle Strohm to more attorneys' fees and costs than the Court's mandatory indemnification ruling because the ETA somehow entitles Strohm to recover in the current proceeding and because a different reasonableness standard applies (Pls' Reply Br. 19). Plaintiffs are wrong on both counts.

First, Ms. Strohm's ETA provides:

> **Subject to the limitations imposed by Utah Code Ann. § 16-10a-902 and the Company's articles of incorporation and bylaws**, ... ClearOne shall indemnify Strohm for any liability and for all reasonable attorneys' fees and costs incurred by her in connection with the SEC Action or any Related Proceedings ....

Original Complaint Ex. A at ¶ 8 (emphasis added). Plaintiffs do not articulate their theory as to how this language somehow provides Ms. Strohm with a right to reasonable attorneys' fees and costs in connection with the current proceeding – especially since the ETA itself does not contain an

attorneys' fees provision. To the extent that Plaintiffs may contend that the current proceeding is a "Related Proceeding," such a claim fails because the instant proceeding does not involve issues concerning ClearOne's improper revenue recognition that were at the heart of the SEC Action and the "Related Proceedings." The current proceeding arises out of Plaintiffs' claims for attorneys' fees and costs pursuant to the ETA, the Dorsey engagement letter, and certain provisions of the Utah indemnification statutes. These claims do not arise out of the transactions and occurrences relating to the company's improper revenue recognition.

Moreover, the attorneys' fees and costs associated with the Dorsey engagement letter claim do not constitute fees and costs "incurred by [Strohm]." Therefore, attorneys' fees and costs associated with the current proceeding are not recoverable pursuant to the ETA.

Second, Plaintiffs cite no authority for their contention that a different – presumably more generous – standard applies to fees awarded pursuant to contract verses pursuant to statute. In both cases, the entitlement is to "reasonable attorneys' fees and costs" or "reasonable expenses" (including counsel fees). In both cases, the standard of reasonableness is governed by Rule 1.5(a) of the Utah Rules of Professional Conduct, which identifies eight (8) factors to be considered in determining the reasonableness of a fee. Since reasonableness is governed by the same eight (8) factors whether it is awarded by contract or by statute, Ms. Strohm's ETA claim should be dismissed as moot in view of the Court's mandatory indemnification order.

Furthermore, the ETA only allows indemnification "[s]ubject to the limitations imposed by Utah Code Ann. § 16-10a-902 and the Company's ... bylaws." Specifically, payment of fees pursuant to ClearOne's bylaws must be authorized by the Board of Directors, and the Board has refused to authorize any further payment of Dorsey's fees. Additionally, Utah Code § 16-10a-902 requires compliance with the requisite standard of conduct such as good faith. Ms. Strohm cannot demonstrate good faith with respect to the perjury count on which she was convicted. Thus, at a

minimum, Ms. Strohm cannot recovery attorneys' fees and costs pursuant to the ETA at least to the extent that such fees and costs are allocable to the perjury count on which she was convicted. Since the mandatory indemnification order similarly limits Ms. Strohm's recovery to "reasonable expenses incurred by [Ms. Strohm] in connection with the [federal criminal] proceeding or claims with respect to which she has been successful" (Order-Indemnification of Nov. 18, 2009 at ¶ 1(a)), Ms. Strohm is subject to the same perjury-related exclusion under the ETA as well.

Finally, the fact that ClearOne's Special Litigation Committee – on October 13, 2003 – authorized ClearOne to enter into the ETA with Ms. Strohm (Original Complaint Ex. A at Recital G) does not constitute the one and only standard of conduct determination that ClearOne is required to make under its bylaws. Utah law expressly requires that those determinations be based on "the facts then known." Utah Code §16-10a-904. After Ms. Strohm was convicted of perjury, ClearOne's Board then knew facts establishing that Ms. Strohm did not act in good faith or otherwise satisfy the requisite standard of conduct – at least with respect to the conduct underlying her perjury conviction.[7] While it is true that "[t]he termination of a proceeding by ... conviction ... is not, of itself, determinative that the director did not meet the [requisite] standard of conduct" (Utah Code § 16-10a-902(3)), ClearOne's Board has determined that the perjury conviction establishes to its satisfaction that Ms. Strohm did not act in good faith or otherwise satisfy the requisite standard. Plaintiffs have not advanced any evidence or otherwise shown how Ms. Strohm could commit perjury in good faith. To the extent that Plaintiffs insist on pointing to the seven (7) counts on which Ms. Strohm was acquitted, the Court has already ruled that Ms. Strohm is entitled to reasonable expenses to the extent of her success. Thus, Plaintiffs have failed to show how Ms. Strohm could be entitled to any reasonable attorneys' fees or expenses in excess of what the Court has already ordered by mandatory indemnification.

[7] Indeed, if the Special Litigation Committee's determination was the only one relevant, there would have been no need for the "subject to" limitations on indemnification at all.

Since Ms. Strohm's ETA claims cannot entitle her to anything in addition to what the Court has already ordered in connection with her mandatory indemnification claim, her ETA claims should be dismissed as moot.

## POINT IV

## STROHM'S CLAIM FOR BREACH OF DUTY TO INDEMNIFY OFFICER STROHM FAILS TO STATE A CLAIM

Almost incomprehensively, Plaintiffs seek to save their Sixth Claim – which seeks attorneys' fees as permissive indemnification pursuant to Utah Code §§ 16-10a-902 and 907(2) – in the event the Court rules that the ETA does not give Ms. Strohm any rights to permissive indemnification (Pls' Reply Br. 21). The cited Utah statutes merely authorize a corporation to indemnify an officer, but do not compel a corporation to do so. Plaintiffs obliquely claim that somehow Ms. Strohm could be entitled to relief under Section 902 since she "submitted the required undertakings." However, Section 902 does not require ClearOne to indemnify Ms. Strohm merely because she has submitted undertakings. Section 902 provides that "a corporation may indemnify" a director against liability incurred in a proceeding if the specified standard of conduct is satisfied. Since ClearOne's Board has determined that Ms. Strohm has not satisfied the requisite standard of conduct – at least with respect to her perjury conviction – and has otherwise decided not to indemnify Ms. Strohm, Ms. Strohm has no viable claim of entitlement pursuant to her Sixth Claim for permissive indemnification.

## POINT V

## STROHM'S CLAIMS FOR UNJUST ENRICHMENT AND PROMISSORY ESTOPPEL SHOULD BE DISMISSED

### A. Plaintiffs' Claim for Unjust Enrichment Fails Because an Enforceable Contract Governs the Subject Matter of the Unjust Enrichment Claim

Plaintiffs concede that their unjust enrichment claim would not be viable "if the Court determines that either the Engagement Agreements or the ETA govern the subject matter of the Plaintiffs' unjust enrichment or promissory estoppel claims" (Pls' Reply Br. 21). Implicitly, Plaintiffs appear to be contending that if the Court rules that they are not entitled to relief in excess of the mandatory indemnification order pursuant to the Dorsey engagement letter or the ETA, then they are entitled to relief on alternative equitable theories of unjust enrichment or promissory estoppel. This argument is belied by the caselaw cited in ClearOne's moving papers – which Plaintiffs do not attempt to rebut.

Regardless of whether Plaintiffs are entitled to additional relief pursuant to the engagement letter or the ETA, however, their unjust enrichment claim must fail because the subject matter is addressed by enforceable contracts. There is no dispute that the Dorsey engagement letter is enforceable – only a dispute over whether it covers the federal criminal proceeding. Similarly, the ETA is indisputably enforceable. Either Plaintiffs are entitled to additional relief under those contracts, or they are not. If they are not, however, they do not get a second bite at the apple by way of alternative equitable claims. Essentially, Plaintiffs are asking the Court to give them something that they are not entitled to through the existing contracts. Where a contract governs the subject matter of the claim, an unjust enrichment claim would in effect be an improper "demand that defendants adjust the contract price." *American Towers Owners Ass'n v. CCI Mechanical, Inc.*, 930 P.2d 1182, 1193 (Utah Sup. Ct. 1996).

"At issue is not whether [there is] a valid breach of contract claim, but whether an enforceable contract exists that provides the possibility of a legal remedy. Unjust enrichment affords relief outside the context of a contractual relationship." *William Stuart Anapoell, M.D. v. American Express Business Finance Corp.*, No. 07-CV-198, 2007 U.S. Dist. LEXIS 88182, *18 (D. Utah Nov. 29, 2007). Since Plaintiffs' claims do not arise outside the context of a contractual relationship, they must be dismissed.

Plaintiffs further contend that Dorsey's representation of Strohm in the federal criminal proceeding conferred a benefit upon ClearOne because ClearOne wanted to ensure that Ms. Strohm cooperated with ClearOne in the legal actions pending against them back in 2003 and 2004 (Pls' Br. 22). Ms. Strohm's attorneys have already been paid for their 2003-04 services, however, and Plaintiffs do not contend – with one exception discussed below – that they conferred a benefit on ClearOne in 2008 or 2009, when the services at issue were performed.

Plaintiffs additionally contend that Ms. Strohm's acquittal on seven of eight counts "conferred a benefit on ClearOne from a public perception standpoint" (Pls' Br. 22). ClearOne disputes that any public perception benefit was conferred by the jury's determination that both ClearOne's former CFO and CEO are now convicted felons. Indeed, from a public perception standpoint, it would have been much better for ClearOne if both of them simply pled guilty – since ClearOne had already been compelled to restate its financials for the years in question. By proceeding with a jury trial, ClearOne's name was bandied about in the local press during the entire course of the proceeding in a decidedly negative context from a public relations perspective. Given these facts, Plaintiffs certainly cannot show that ClearOne somehow accepted or retained a benefit under such circumstances that make it inequitable to retain the benefit without payment of its value. *American Towers*, 930 P.2d at 1192 (Utah Sup. Ct. 1996). Accordingly, Plaintiffs' unjust enrichment claim should be dismissed.

**B. Strohm's Claim for Promissory Estoppel Fails Because an Enforceable Contract Exists that Contains the Promises at Issue**

Again, without contesting any of the caselaw cited by ClearOne, Plaintiff contend that the Amended Complaint sets forth "various promises to the Plaintiffs and not just those contained in a contract" (Pls' Reply Br. 22). However, Plaintiffs fail to cite even a single example of any promise not contained in the ETA or otherwise seeking to characterize the ETA's promises.

Accordingly, ClearOne is entitled to summary judgment with respect to Plaintiffs' Fifth Claim for promissory estoppel as well.

## CONCLUSION

For all of the foregoing reasons, ClearOne respectfully requests that the Court grant ClearOne's motion for summary judgment with respect to Plaintiffs' First, Second, Third, Fourth, Fifth, Sixth, and Eighth Claims for Relief, deny Plaintiffs' renewed motion for partial summary judgment on Plaintiffs' Third Claim for Relief, and enter a briefing schedule regarding the reasonability of Ms. Strohm's criminal defense fees in order to fully and finally resolve the parties' dispute.

DATED this 4th day of January 2010.

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## CERTIFICATE OF SERVICE

I hereby certify that I am employed by the law firm of SEYFARTH SHAW LLP, 620 Eighth Avenue, Suite 3200, New York, New York 10018, and that pursuant to Rule 5(b), Utah Rules of Civil Procedure, a true and correct copy of the foregoing **DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT** was delivered to the following this 4th day of January 2010 by:

[ ] Depositing the same in the U.S. Mail, postage prepaid

[ ] Via Hand Delivery

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